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THE INTERNATIONAL LAW COMMISSION

THE consideration of the Report of the International Law Commission by the Sixth Committee of the United Nations Assembly gives the United Kingdom Government a welcome opportunity both of stating again its general view as to the present place of international law in the world community and of defining its attitude generally towards the Commission and its work.

In the United Kingdom we have a great and traditional respect for the rule of law but we are not so innocent as to suppose that all the problems which confront the world today, and some of which bedevil our relations with each other, are capable of solution by applying the rules of international law or by recourse to the International Court. In municipal systems of law there arise from time to time matters which go beyond the rights and duties of particular individuals and which raise problems of a social, economic or political nature, concerning the community as a whole, which can only be solved by legislation. And so in the international field there are a great many problems which, because they are capable only of a political solution are outside the appropriate province of international law. And as there is no super State, as the Assembly is not an international legislature, those matters can only be settled, perhaps after frank discussion in the Assembly, by agreement and conventions between the States. But that is not to say that there are not many matters, at present the subject of dissension—some of them actually on our Agenda here—which would not be better dealt with by the application to them of the rules of international law as they already exist, and we deplore the fact that some States, owing, as we think, to a misguided insistence upon State sovereignty, are unwilling to accord to

international law and to the International Court its proper place in the international community.

Now it is true enough that the acceptance of a rule of international law involves pro tanto a derogation from sovereignty—just as the acceptance of rules of municipal law involved a derogation from the complete and lawless independence of every individual in savage society. But provided that derogation applies equally to every sovereign State it leaves each in the relative position it was before, equal with the other members of the family of nations. And the real point of Article 2 (1) of the United Nations Charter, which bases our organisation upon the sovereign equality of our members is, of course, not its emphasis on sovereignty in the absolute unfettered sense but upon equality. Every treaty, as Mr. Litvinov once said, involves a derogation from sovereignty. The States which subscribed to the Charter accepted a considerable limitation of sovereignty. But they retained their equality. We shall only make real progress towards the rule of law in international affairs when all States accept the obligations which any system of law involves in the knowledge that similar obligations are imposed equally upon all other States and that, therefore, their existence is a protection to all States against arbitrary action. Absolute sovereignty in international affairs is akin to anarchy in municipal ones—and as little to be tolerated. Those who object—as unhappily some do—that, for instance, Article 14 of the draft Declaration on the Rights and Duties of States, which says :—

> 'Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law'

are seeking to put a premium upon the influence of military might in world affairs and are flying in the face of the basic principles of the Charter.

Now it is quite evident that the better establishment of the existing rules of international law, still more their extension over new fields, is going to be a difficult matter so long as the present political tensions and suspicions continue to exacerbate the world's problems, but one of the ways in which at least the first of those objects can be promoted is no doubt by the more clear enunciation of what the existing rules of international law are. When the rules themselves, as they exist today, are clearly and authoritatively set out, so that those who run to more aggressive or lawless courses may plainly read the rules they break, States are the more likely to be guided by them in their conduct and to realise that their observance protects the maintenance, not, indeed of absolute

sovereignty but of that sovereign equality with which the Charter is concerned. And with that will come a greater appreciation of the fact, already demonstrated by experience, that legal solutions, laid down in the calm detached objective atmosphere of the International Court, are more likely to be acceptable to all concerned than the decisions of a majority in the Assembly based on political grounds.

For these reasons we have regarded the establishment of the International Law Commission, set up in conformity with Article 13 of the Charter, as a matter of the first importance in the field both of international law and the comity of nations, and I want now to say a word about its status and functions, its relationship with State Governments and with the Assembly. It will have been observed that the Statute of the Commission, as indeed the Charter of the United Nations, draws a significant distinction between the formulation of the existing rules of international law, commonly called codification, and the development of international law by extending it to new fields. The latter function is of a more or less political nature. It involves the laying down of new rules of law. And in the discharge of that function the Commission must, naturally enough, act on the directions of the Assembly or other organs of the United Nations. Nor can its work there amount to more than drafting new laws on new topics, in the manner which it considers most consistent with the existing principles. The adoption of those drafts will be for the Assembly and individual States to agree by Convention : the Commission cannot lay down new laws, and its work in that field must be subject to direction by the Assembly and approval by member States. In the field of codification, however, the position is quite otherwise. Here the Commission is concerned simply to ascertain what the existing law is and to formulate it and systematise it in a more precise way. Its task is clarificatory and not legislative. I emphasise the distinction between the two fields of work because I think a certain confusion of them in the Commission led both to a misunderstanding of the Commission's status and of what it was seeking to do. Thus, on p. 7 of the Report, where the Commission was concerned with enunciating the existing law in the draft Declaration of the Rights and Duties of States, it appears that my distinguished Soviet colleague was seeking to embody various rules which, whether or not admirable in themselves, clearly involved new law. That, of course, was inappropriate in a document which was declaratory, not legislative.

And that leads me to emphasise our view as to the status of the Commission, at least in regard to its declaratory function

of codification. Although the Commission was created by the Assembly we do not regard it as being an organ or agency of the Assembly as such. It is, as we prefer to understand it, a body of distinguished and independent experts, not controlled by their own Governments nor necessarily representing the views of their Governments, responsible in the last resort to the Assembly but entitled to do in their own way and in their own order the work which they consider most conducive to their task. It is, indeed, only if the Commission is accepted in this light and its work treated accordingly, that it will be able to carry out its functions and promote the fundamental intention of Article 13 of the Charter.

Looked at in this way, and on the assumption that it is permitted to function in accordance with these principles, my Government regards the Commission as a body whose authority and independence in the field of international law is second only to the Court of International Justice itself. Its views and proposals cannot, of course, have the binding effect or the fundamental authority of the judicial decisions of the Court. But the Court can only deal with those matters which are submitted to it in accordance with its Statutes. The International Law Commission is free, within its field, and within the boundaries of its Statute, to initiate its own studies, choose for itself the topics with which it will deal, and decide their priority. In that way they can do most valuable creative work in elucidating and clarifying topics of international law which are difficult or obscure, and in restating or codifying those parts of it which are suitable for that purpose. We think, therefore, that the Assembly should not attempt to give anything in the nature of detailed instructions to the Commission, and should also avoid, for the present, referring to it any further major topics which would have the effect of overloading it. The Commission only has a limited amount of time for its work, its members are not our paid servants. It already has many important topics to study, and we must not refer so many specific questions to it as to sidetrack it from the pursuit of its main purpose of codification and development nor, of course, must we make it a dumping ground for matters which we ought to dispose of in the Assembly or its Committees here.

The Commission held its first meeting from April to June of this year and drew up the Report which is now before us. We think it an admirable document and we congratulate the Commission, some of whose distinguished members are, I am glad to see, in a different capacity in this Committee. As was to be expected in the first session of the new Commission, it had largely to concern itself with matters of a procedural, administrative or preparatory nature.

We find ourselves in general agreement with that part of the Report and at this time I only refer to one matter contained in it. It has a close connection with the basic independent position of the Commission to which I have referred. That is, the statement in paragraph 42 that the living allowances have been found scarcely sufficient. These gentlemen, who are good enough to assist the United Nations by serving on this Commission, do so at some considerable financial sacrifice. They are not salaried servants of their Governments—or, if they are, in one or two cases, it is fortuitous—and they are not paid by us. We have indicated our view as to the importance of that. It is of the essence of the matter that the members of the Commission should be independent experts not responsible to their Governments, able to give their views and come to their conclusions on the basis of legal considerations pure and simple. At the very least, therefore, we must see to it that they are not under financial disability or compelled to draw upon their personal resources. I hope that in consultation with Committee 5 we shall be able to meet the representations which have been made.

May I now turn to certain of the substantive conclusions and recommendations contained in the Report. The first of these relates to the controversy which arose as to the competence of the Commission to proceed immediately with the work of codification, under Articles 19 to 23 of its Statute, in regard to any topics which it thought appropriate, and without having first the specific approval of the Assembly for the selection of those topics. Our view as to that will have been plain from what I have already said. We agree with the large majority of the Commission that the matter was for them. We think that the records of our discussions in the Assembly on the adoption of the Statute show that that was the Assembly's intention. If the Commission, consisting as it does of a comparatively small number of recognised experts, and after mature deliberation, reaches the considered conclusion that certain topics are appropriate for codification, and also gives an order of priority to those topics, it does not seem to us that the Assembly, which cannot afford to give the same detailed and deliberate study to the matter, is likely to be able to reach a more useful view. No doubt, if there were some subject the codification of which the Assembly thought, for some particular reason or another, was especially desirable, the Commission could be so informed. Indeed, if we were to express our own view, we think that there are certain matters, more important in the sense that they are arising more frequently in the international sphere than those to which the Commission have given priority. For instance, the first two

mentioned in paragraph 16 of the Report, namely, the recognition of States and Governments and the subject of State succession, are matters of great practical importance. But although I indicate that view I do not think we should rewrite the Commission's order of priority for them. Indeed the Commission has no doubt had to consider, in assigning priority to particular matters, not only that intrinsic and practical importance but the prospects of securing effective agreement about them. Topics which are urgent and highly topical are usually also those which are highly controversial and difficult, and it would be a pity—as those who remember the proceedings at the Hague Codification Conference of 1930 will agree —if the work of the Commission were to be held up at the initial stage owing to the fact that it had sought to deal too expeditiously with those problems likely to cause most controversy. *Festina lente.*

I now come to the only other matter to which, at this stage, I wish to make particular reference, namely, the draft Declaration on the Rights and Duties of States. It is an exceedingly difficult subject. Difficult because it is hard to know what its precise limits are. And difficult because there is the manifest temptation to declare what the rights and duties of States ought to be, in a perfect system of law, not what they must be accepted as being under the existing law. In one sense, I suppose, such a declaration might be regarded as covering the entire field of international law, since the subjects of that law are States. But obviously the declaration here in view could not be a compendium on international law generally. On the other hand, if only certain rules and principles are to be formulated, it may be difficult to know where to stop and on what basis to include certain rules and principles and exclude others. Faced with this difficult and rather invidious task, and having as its basic text the draft declaration submitted by Panama in 1947, the Commission has, in our view, done its work in a most competent manner and produced a judicious and well balanced text which, whilst not pretending to cover the whole field, does lay down a number of principles which we should all be ready to accept as fundamental to pacific relations between equal States under the law. Some of these principles it is true do not consist of and would be difficult to state as precise rules of law. But for that very reason they find their place most appropriately in a declaration on the Rights and Duties of States, the purpose of which is not so much to state the particular rules of law as to lay down the principles on which those rules are and must be founded. Looked at in that way, my Government welcomes this draft Declaration as a most authoritative statement of the general principles on the matter.

But whilst this Declaration does not attempt to codify all the rules of law on the matter, still less does it seek to lay down new rules. It must, I think, have been because of some misconception that those were its true objects that the learned Soviet jurist, our colleague Mr. Kovetsky, raised the objections that are set out on p. 7 of the Report, and, as I greatly regret, voted against it. Many of the matters which the Soviet representative would have liked to see in the Declaration were quite obviously not matters of existing law, but matters for which, in the view of the Soviet representative, the law should in future make provision. That is legislation, and in regard to some of those matters the Soviet Delegation have already sought to move the Assembly. It is a familiar technique here to vote against particular proposals on the pretext that they contain shortcomings. Even if that pretext could be justified here, which in view of the declaratory, and not legislative character of the draft, it cannot be, it would afford no reason for not accepting the draft. Those who are not prepared to walk, because they cannot run, usually get nowhere. I hope that that is not the object of the Soviet opposition to this draft. I would say the same in regard to the Jugoslav proposals, and to the other suggested amendments to the Commission's draft which have been circulated. I can well understand the feelings of the Jugoslav Government, in face of the affronts and injuries they have received. I can understand also that some of the other contemplated amendments might be thought by some to constitute improvements. But it is neither for us to do the work of the International Law Commission, nor to regard that body as a mere drafting Committee. If we here are going to put forth a Declaration of the Rights and Duties of States then, I say, let us take that task away from the Commission. We cannot both discharge it. There is little advantage in setting up an authoritative and independent Commission if we here, with no more authority, but less independence, are to go over it all again, and, at the end of the day produce something quite different, if, indeed, we produced anything at all. Whilst the Assembly is eminently competent to consider general proposals of a political or social or economic nature, it is of all international bodies the least fitted to do the work of actual drafting, particularly in legal matters. It has neither the time, nor the means, to do the work of close comparison, appreciation and evaluation which is necessary before an integrated and balanced instrument, such as this Commission's draft, can be produced. I hope, therefore, that we shall not seek to amend or amplify the Commission's draft.

My Government would be opposed also to any suggestion for returning the draft to the International Law Commission for further

study in the light of what passes here. In our view the Commission was instructed to do this particular work by the General Assembly Resolution of November, 1947, and it has done it. It had before it the Panamanian draft and all other relevant documents. All member States were entitled to submit their comments and representations. Many did. All those were considered. But at the end of the day, the Declaration had to be and is the draft of the International Law Commission. It is their draft, not ours, and it is unlikely that this body of responsible, professional experts would alter their view as to what the Declaration should contain simply because of conflicting views which might be expressed here. We shall, therefore, oppose any suggestion, if such were made, to refer the matter back or to ask the Commission to redraft the Declaration in any particular. Let us by all means push ahead politically with proposals for the improvement of the law. Let us, in particular, seek to lay down rules which will make it abundantly clear that those indirect aggressions which are taking place today are contrary to the basic principles of law. But let us accept this for what it is, as an important contribution, not by us but by the independent body of experts, to the sources of the existing law. We urge this Committee, as we shall urge the Assembly, to receive and recognise this draft Declaration for what it is, as an authoritative restatement of the principles of law on these matters; one which States individually are not compelled to accept as a final and complete codification of all the rules of law, but as a Declaration which, coming from the most distinguished body it does, must be regarded as possessing great weight and authority. In that way we shall, I think, take a useful step forward, and one which may lead to individual States, the International Court, and the United Nations being able to take more practical action in regard to concrete matters than has been possible in the past.

Hartley Shawcross [1]

[1] The text of a speech delivered by the Right Honourable Sir Hartley Shawcross, K.C., M.P., Attorney-General of the United Kingdom, to the Sixth (Legal) Committee of the General Assembly of the United Nations on October 13, 1949.

THE CONTRACTUAL AND RESIDENCE BASES OF NULLITY JURISDICTION

THE renewed endeavour by the Court of Appeal in *Casey* v. *Casey* [1] to clarify the law of nullity jurisdiction, following close on its earlier consideration of this and related issues in *De Reneville* v. *De Reneville* [2] justifies a review of this topic in order not only to integrate the apparent re-orientation necessitated by that decision but also to assess the merits and implications of the reasons for judgment in the light, both of juristic principle and the earlier case law, as contributed by the courts of England and other law districts of the British Commonwealth before which these questions have, on numerous occasions, been canvassed in an atmosphere of evident controversy and hesitation. This investigation appears the more important by reason of the lack of unanimity on certain aspects of the problem which emerges from an analysis of the two principal judgments delivered by the court, and on account of the conclusion, which is submitted with the greatest respect but none the less ventured with conviction, that neither opinion is altogether immune from criticism by the test of the above-mentioned criteria.

The *Casey Case* serves as a convenient starting-point for the succeeding discussion, and its effect should, therefore, be summarily stated by way of introduction. In 1943 the marriage in question was celebrated in England between the female petitioner, who was then domiciled in this country, and a member of the Canadian Forces whose domicile was, and throughout remained, Canadian. The marriage was never consummated and, after an unsuccessful attempt to establish cohabitation and marital relations with the respondent in Canada after his demobilisation, the wife returned to England and instituted proceedings for nullity on the ground of his wilful refusal to consummate the marriage. The petition was served on the respondent outside the jurisdiction but was undefended. The court disclaimed the power to entertain the proceedings in the absence of proof of the parties' domicile, or possibly residence, in England, notwithstanding the fact that the marriage had been celebrated in this country. The reasons for judgment may be briefly summarised as follows : Bucknill L.J., with whom Cohen L.J. concurred, perceived that the decisions which had

[1] [1949] 2 All E.R. 110.
[2] [1948] P. 100.

established the jurisdictional competence of the locus celebrationis in cases where the validity of marriage was impeached on grounds of non-compliance with formalities, want of capacity, and even bigamy were no authority for petitions based on impotence or wilful refusal to consummate, and that the latter proceedings were, in essence, indistinguishable from divorce in which jurisdiction is confined to the courts of the domicile. Additionally, consideration of the balance of hardship to the parties indicated a preference to dismiss the petition because, while jurisdiction based on joint residence might be defensible on grounds of convenience, the wife in the present case could have instituted proceedings while in Canada, and her election to return to England ' tipped the scales of hardship in favour of the husband '. In contrast, Somervell L.J. intimated that, in his view, the Court of Appeal in *De Reneville* v. *De Reneville* had not accepted the notional identification, for purposes of jurisdiction, of suits of nullity in respect of voidable marriages with divorce proceedings, but reached the same conclusion as the other members of the court on the ground that jurisdiction of the locus celebrationis was confined to cases where the validity of the ceremony alone was in issue. These somewhat divergent contentions merit closer analysis in the wider perspective of evolution of the contractual and residence bases of nullity jurisdiction.

I

The decision of the House of Lords in *Salvesen* v. *Administrator of Austrian Property*,[3] which both effected a complete revision and restatement of the juridical nature of nullity proceedings, and became destined as the pivot of the modern law applicable to these suits, did not authoritatively determine whether the jurisdiction of domiciliary courts was exclusive or permitted of the existence of concurrent bases. Lord Haldane failed to commit himself on this vexing question, and carefully restricted his comments to the observation that ' the real question is simply whether the court of domicile was competent to dispose conclusively and finally of the question before it. If so, it does not matter in law whether it had an exclusive jurisdiction '.[4] In contrast, Lord Phillimore was emphatic that ' if the court is a competent court—and, in my opinion, the Wiesbaden court was the only competent court—for these parties, its judgment must be universally binding '.[5] While it is difficult to escape the impression that Lord Phillimore regarded

[3] [1927] A.C. 641.
[4] At p. 652; see also at p. 654. Lords Dunedin, Blanesburgh and Warrington ignored this problem altogether.
[5] At p. 671.

jurisdiction of the domicile as exclusive, the dictum itself did not unequivocally preclude the claim of the forum of the parties' residence, more especially on the question of assumption of jurisdiction by English courts as distinct from that of the competence of foreign courts in respect of recognition of their decrees in this country.[6] The above-cited dictum did, however, inferentially negative jurisdiction of the forum loci celebrationis. In *Salvesen's Case* the parties were both resident and domiciled in Germany at the date of the German proceedings, but it could not escape attention that the marriage had been celebrated in Paris. Would a French court have been competent to annul the marriage? The answer is dependent on the same considerations as the problematical correctness of the assumption of jurisdiction in analogous circumstances by English courts, so that decisions dealing with either aspect of the problem may be employed interchangeably to assist the present inquiry.

It is to be observed at the outset that the claim to jurisdiction by the forum loci celebrationis is not inconsistent with the acceptance of the status principle of nullity proceedings, since it does not derive from the jurisdictional requirements governing actions in personam. Theoretically, the contention may be legitimately advanced that the law district where the marriage has been contracted is peculiarly interested and fitted to determine whether the marriage 'res' has been created without thereby impairing the fundamental postulate established in *Salvesen's Case*. On the other hand, it is incontestable that the origin of this jurisdictional basis is found in the combination of two principles, both of which are now largely discredited. First, it is bound up with the 'contractual theory' of the marriage relationship, familiarised by Story and commonly accepted in this country during the greater part of the nineteenth century.[7] Apart from its relevance to formalities,[8] its influence is no longer acknowledged in relation to the intrinsic validity of marriage or the status which it creates.[9] It is no mere coincidence, however, that it was Sir Gorell Barnes who not only endeavoured in *Ogden* v. *Ogden*[10] to prevent the acceptance of the status principle, and with it the domiciliary basis of jurisdiction, but also consistently championed the contractual theory as

[6] See Pilcher J. in *Hutter* v. *Hutter* [1944] P. 95, 107. Andrews L.C.J. in *Mason* v. *Mason* [1944] N.Ir. 134, 154, considered Lord Phillimore's dictum as 'at variance with settled principle and authority'.

[7] See *Simonin* v. *Mallac* (1860) 2 Sw. & Tr. 67; *Sottomayor* v. *De Barros* (*No.* 2) (1879) 5 P.D. 94.

[8] *Berthiaume* v. *Dastous* [1930] A.C. 79; *Apt* v. *Apt* [1947] P. 127; [1948] P. 83.

[9] *Brook* v. *Brook* (1861) 9 H.L.C.193; *Mette* v. *Mette* (1859) 1 Sw. & Tr. 416; *Re Paine* [1940] Ch. 46; *De Reneville* v. *De Reneville* [1948] P. 100.

[10] [1908] P. 46.

determinative of the choice of law rule governing the intrinsic validity of marriage, both in that case and in *Chetti* v. *Chetti*.[11] Secondly, it is based on the premise that jurisdiction follows the choice of law rule which owes its parentage to the obsolete decision in *Scrimshire* v. *Scrimshire*.[12] This approach was reflected by the reasoning of Sir C. Cresswell in *Simonin* v. *Mallac*,[13] where the principle of conceding jurisdiction to the courts of the country of celebration found its first clear enunciation in modern law. In the course of his judgment he suggested that ' the parties, by professing to enter into a contract in England, mutually gave to each other the right to have the force and effect of that contract determined by an English tribunal ', and ' this is an indisputable rule of law . . . that a man who contracts in a country engages for a competent knowledge of the law of contract in that country. If he really presumes to contract with such knowledge he must take the inconvenience from such ignorance upon himself '.[14] American adherents of this theory prefer to find its justification in the related argument that, in order to accomplish the drastic effect of invalidating a marriage ab initio a court must have power over the entire relationship, since the effect of adjudication is of such delicate nature that only the courts of the country where the contract was concluded can be entrusted with the power to pronounce on its validity. ' The question involves the determination of the previous state of the law, as to which (the sovereign of the locus celebrationis) has the most authoritative information '.[15]

This sequence of reasoning proves at once too much and too little. It is undoubtedly true that English courts at one time subscribed to the view that ' the substantive law of the forum was the rule of decision in all cases determinable by that forum. If a given case was not subject to the law administered by the given court, that court would (or should) not take jurisdiction of such a case '.[16] But this archaic concept which made the question of jurisdiction dependent on the choice of law factor was excised from the English legal system by Lord Mansfield in *Holman* v. *Johnson*.[17] Since 1775 no objection has been raised on general grounds to the principle which had found acceptance on the Continent as early as the Renaissance, that the courts of a given State enjoy the power to render an adjudication by applying a foreign system of law. An

[11] [1909] P. 67.
[12] (1752) 2 Hagg.Con. 395.
[13] (1860) 2 Sw. & Tr. 67.
[14] At p. 75. Thus also Pilcher J. in *Hutter* v. *Hutter* [1944] P. at pp. 103 and 107.
[15] Note in 26 Harvard L.R. 253, 255.
[16] Sack, *Law: A Century of Progress*, vol. 3, at p. 356.
[17] (1775) Cowp. 343.

apparent survival of the exploded view, in the law of matrimonial causes, may conceivably be detected in the accredited rule that a competent court may pronounce a decree of divorce in accordance with its own internal law.[18] That rule, however, stems from an entirely different principle which found expression in Story's apprehension of the undesirability 'to engraft foreign remedial justice upon domestic institutions'[19] and in Savigny's conviction that it was justified by the presence of supervening considerations of social policy which entitled a State to consider none but its own domestic law in relation to the substantive issue of divorce proceedings.[20] These considerations, however, are solely germane to dissolution and inapposite to nullity of marriage. The existence of certain aspects of similarity between these matrimonial suits does not provide a justification for the application of identical conflict rules beyond the recogniton that the courts of the parties' prevailing domicile are particularly suited to deal with any dispute concerning the validity of a given marriage by reason of the impact of nullity decrees upon the marriage status. The domiciliary basis has proved itself as the most appropriate jurisdictional criterion for all suits which are of social and public importance, particularly in the sphere of family relations. The parallel, however, ceases at this point. Nullity proceedings take reference to the inception of the marriage relationship and, unlike in divorce, the decree does not purport to sever a validly subsisting marriage status. The claim of jurisdictional authority by the parties' present domicile is not, therefore, based on the exercise of its sovereign right to control the status of its subjects by virtue of an act of public authority, with the concomitant demand for the right of adjudication in accordance with the lex fori. Once the nexus between jurisdictional control and the marriage has been established, the function of the domiciliary concept in this sense has been exhausted. The jurisdictional factor is not, as in divorce, the primary or exclusive vehicle for giving effect to the presence of foreign elements in the suit because the domiciliary court is obliged to refer the substantive issue to the law governing that incident of the marriage with respect to which an impediment to the valid creation of the marriage is alleged to be subsisting. This consideration also weakens the argument in favour of exclusive jurisdiction by the courts of the domicile because there is no ground for apprehension lest the adjudicating court apply its own internal law qua lex fori.

[18] This appears to be Professor Sack's view, as I understand him. See *op. cit.*, pp. 395–8.
[19] *Conflict of Laws* (1841 edn.), pp. 296–8.
[20] *System des heutigen Römischen Rechts*, vol. 8, p. 337.

The distinction between the respective proceedings, consisting in the fact that nullity decrees avoid the marriage ab initio on the basis of ante-nuptial defects while divorce terminates a validly subsisting status a praesenti on account of supervening misconduct or objective disruption, has occasionally been exploited beyond the scope of the choice of law problem and transferred to the jurisdictional sphere. Thus it has been contended by a school predominant in the United States that jurisdictional competence must differ to the same extent, and is conditioned by the distinct objects of the respective suits. This approach has led to the conclusion that 'a State can exercise through its courts jurisdiction to nullify a marriage from its beginning only in so far as the marriage in respect to the requirement for its validity which it is claimed was not satisfied, was governed by its own law'.[21] That postulate of the American Draft Restatement of the Conflict of Laws is based on the assumed inevitability, or perhaps desirability, of identifying the choice of law rule and jurisdictional competence in all matrimonial proceedings. The analogy to divorce, initially rejected for the purpose of eliciting a basis of jurisdiction, is thereby retained as a major premise in so far as it postulates the unavoidable application of the lex fori. It is submitted that this proposition, which finds its justification in relation to divorce proceedings in the coercive character of its exercise, is wholly inappropriate to nullity of marriage, and was in fact, rejected in the Final Draft of the Restatement.[22]

Additionally, the contention which seeks to justify the competence of the locus celebrationis by reason of the applicability of the internal law of the country of solemnisation to the validity of marriage, proves too little because its premise no longer corresponds to the modern English conflict rule which subjects questions of intrinsic validity to the law of the domicile. The rejection of the contractual theory of marriage as a basis for the selection of the 'rule of reference' which commenced with the decision of the House of Lords in *Brook* v. *Brook*,[23] has thus to a large extent withdrawn the platform on which the jurisdictional claim of the locus celebrationis rested and suggests a critical evaluation of decisions preceding that fundamental re-orientation in the English conflict of laws. In order to escape this dilemma, its apologists have retrenched their claim to competence in respect of proceedings where the alleged impediment arises from non-compliance with formalities. Extremists have indeed advocated the exclusive right

[21] Restatement, s. 121.
[22] (1934) s. 115.
[23] (1861) 9 H.L.C. 193.

of adjudication in these circumstances. This pretension appears to have been accepted in the leading American decision of *Levy* v. *Downing*,[24] but in so far as the judgment by Sir Gorell Barnes in *Ogden* v. *Ogden* carries a similar implication, it met with emphatic rejection in *Salvesen's Case*, with the result that it is now well-established in England that a foreign domiciliary court is competent to annul a marriage celebrated in this country [25] and that English courts may conversely entertain proceedings with respect to marriages contracted abroad.[26] Traces of the unorthodox view, however, have remained in the submission that the forum loci celebrationis is competent *only* where the validity of the ceremony is in issue.[27] Not only is its undisguised derivation from the exploded premise of the identification of choice of law rule and jurisdiction a recommendation of dubious merit, but it is also difficult to appreciate the weight of the inevitable implication that the courts of the country of celebration are less qualified to deal with intrinsic defects than with questions of formalities, while unreserved wisdom is unhesitatingly ascribed to the tribunals of the parties' present domicile. Moreover, equally on the score of convenience, no substantial argument can be conceived to support the suggested distinction because the balance of hardship to the parties can hardly be affected by making the concession or denial of jurisdiction dependent on the nature of the alleged impediment.

This theory of the limited competence of the forum loci celebrationis appears now to have secured a protagonist in Somervell L.J. who, in *Casey* v. *Casey*, assented to the dismissal of the petition based on the respondent's wilful refusal to consummate a marriage contracted in England on the ground not that the alleged impediment entailed voidability as contrasted with total nullity, but that it was unrelated to the validity of the ceremony. The fact that the contractual criterion of jurisdiction had not hitherto, in its chequered history, succeeded in gaining the avowed authority of the Court of Appeal but rests, with but one exception, on a catena of decisions by courts of first instance, might well have furnished an opportunity for drastically and unequivocally repudiating its propriety for all purposes. However that may be, it is strange that the learned judge should have failed to notice the

24 (1913) 213 Mass. 334. It should be pointed out that the case was primarily concerned with the problem of choice of law; the jurisdictional question was treated as a mere side-issue. Cf. also *Dodds* v. *Pittsburgh Ry.* (1932) 162 Atl. 481.

25 *De Massa* v. *De Massa, The Times* Newsp., March 31, 1931; *Galene* v. *Galene* [1939] P. 237.

26 *Mehta* v. *Mehta* [1945] 2 All E.R. 690; *Apt* v. *Apt, supra.*

27 See Cheshire (2nd ed.), pp. 339–440, and Dicey (5th ed.), p. 297. Cheshire has revised his views in the third edition. Cf. also Andrews L.C.J. in *Mason* v. *Mason* [1944] N.Ir. 134, 146.

embarrassing fact that the sole occasion on which that appellate tribunal entertained a petition for nullity on this basis happened to be one in which the marriage was impeached for its intrinsic invalidity. The case of *Sottomayor* v. *De Barros*[28] was admittedly only argued on the choice of law question, thus conceivably leaving an opening for disregarding it as a binding precedent in support of the competence of the country of celebration to entertain proceedings in the absence of residence or domicile, but its existence in any event strongly militates against the narrower proposition advanced by Somervell L.J. It is also inconsistent with decisions like *Linke* v. *Van Aerde*,[29] where the ground for the decree was the respondent's previous and still subsisting marriage, apart from the more controversial cases of *Easterbrook*[30] and *Hutter*[31] where jurisdiction was entertained on the cumulative grounds of residence and celebration in petitions alleging wilful refusal to consummate. It is submitted, therefore, that, subject to the special considerations arising in respect of voidability which will be presently discussed, the jurisdictional competence of the locus celebrationis should be acknowledged or, preferably, rejected, irrespective of the nature of the alleged impediment or the connecting factor predicated by the choice of law rule appropriate to the particular defect in marriage.

II

Prior to *Salvesen's Case*, the contractual basis of nullity jurisdiction supported proceedings by English courts in *Simonin* v. *Mallac*, *Sottomayor* v. *De Barros*, *Linke* v. *Van Aerde* and *Valier* v. *Valier*,[32] and was also invoked in Ireland in *Sproule* v. *Hopkins*.[33] The sole occasion on which it was resorted to for the purpose of justifying the assumption of jurisdiction by a foreign tribunal presented itself in *Mitford* v. *Mitford*.[34] That decision, however, cannot be regarded as entirely satisfactory or unequivocal because the jurisdictional competence of the German court as such appears to have been but a secondary issue in the English proceedings and was not seriously challenged by the petitioner. Lord Merrivale briefly adverted to the problem by referring to Lord St. Helier's cryptic statement in *Roberts* v. *Brennan*[35] that residence, not

[28] (1877) 3 P.D. 1. See also (1879) 5 P.D. 94.
[29] (1894) 10 T.L.R. 426.
[30] [1944] P. 10.
[31] [1944] P. 95.
[32] (1925) 133 L.T. 830.
[33] [1903] 2 Ir.R. 133.
[34] [1923] P. 130.
[35] [1902] P. 143, 144. The authority of this decision was fully discussed in *De Reneville* v. *De Reneville* [1948] P. 100, 116–7.

domicile, conferred jurisdiction in nullity; but since the accuracy of that observation was most probably questionable even at the time of its pronouncement and has since been authoritatively controverted, the correctness of the decision is usually defended by resort to the principle, which was also indorsed with evident approval in the judgment, that the German court enjoyed international competence by virtue of the fact that the marriage de quo had been celebrated in that country. One further aspect of the decision which is of peculiar significance for the present purpose, merits comment. The ground on which the German court pronounced the decree was that the petitioner had been mistaken as to the personal attributes of her putative husband, under Art. 1333 of the German Code, the infraction of which entails the sanction, under that legal system, of voidability, and not nullity, within the meaning of that dichotomy as predicated both by German law and, more materially, by the English conception of that distinction in the sense of necessitating a specific judicial determination of invalidity. The decision might, therefore, be cited as a precedent for that jurisdictional basis in respect also of voidable marriages, were that contention not materially weakened by the patent misconception entertained by the learned president as to the nature of the relevant defect which he appeared to regard as comparable to mistake of identity, presumably by analogy to English domestic law, and consequently as a cause of absolute nullity.

Sir S. Evans in the case of *Countess de Gasquet-James*,[36] seems to be the only judge on record, at this stage of evolution, to have expressed his disapproval of this basis of jurisdiction on general grounds. Professor Westlake also entertained certain misgivings of its propriety which were given more pointed emphasis by the editor of his treatise, Professor Bentwich.[37] Indeed, the impact of the decision in *Salvesen's Case* did not prove wholly abortive, and in 1931, Bateson J. in *Inverclyde* v. *Inverclyde* [38] considered himself bound by Lord Phillimore's dictum to reject, for want of jurisdiction, a petition for nullity alleging the husband's impotence in a case where the marriage had been celebrated in England but both parties were at all material times domiciled in Scotland. After observing that, in his opinion, it was 'more expedient to have the certainty of one court and one court only giving judgments in rem deciding the condition of status of married persons',[39] the learned

[36] [1914] P. 53, 57.
[37] Cf. 4th ed. (1880), p. 90, and 6th ed. (1922), p. 93. See Falconbridge, 26 Canad.Bar R. at p. 914.
[38] [1931] P. 29.
[39] At p. 50.

judge proceeded to engraft the rider that this principle was applicable only to the specific case of voidability. The judgment discloses clearly that Bateson J. would have preferred to subscribe to the conclusion that jurisdiction in all nullity suits appertained exclusively to the courts of the domicile, but found himself confronted with too long a line of contrary decisions to enunciate a rule of jurisdiction in this sense unqualified by the distinction between voidability and nullity. Since, however, no precedent existed on the question of the jurisdictional competence in proceedings of the former kind, an opportunity offered itself to give scope, if only a limited one, to the modern status principle. By so doing, the learned judge introduced into English law an entirely novel differentiation which I venture to suggest is not only incompatible with the traditional concepts of matrimonial law but also fallacious in point of analysis.

In the first place, is there any justification for employing the dispensability of a specific judicial decree in respect of defects resulting in absolute nullity—which is but an accidental historical consequence of the partial overlapping in sphere of competence between the ecclesiastical tribunals and the common law courts and not attributable to a conceptualistic differentiation—as an argument that such ' void ' marriages are to be treated as ' non-existent ' for purposes of jurisdiction, if a decree is in fact desired? After some conflict of judicial pronouncements, it is now irrevocably established that a decree of nullity of this nature cannot be regarded as a merely gratuitous ' declaration ' but constitutes a declaratory judgment in rem. The decision in *Salvesen's Case* has consequently punctured the basis of distinction between nullity and voidability in so far as the alleged similarity of the latter with divorce was defended on the ground that the decree in these proceedings, unlike that in suits alleging complete nullity, impinges upon the status of the parties to such marriage. Secondly, it has been said that there exists a marked functional similarity between decrees of dissolution and of annulment of voidable marriages in that both effect a change of status, in contrast to a decree in respect of an absolutely void marriage which is only a declaration of an existing status. This premise is illusory in view of the principle that a decree of either kind in terms declares the marriage to have been void from the beginning. Notwithstanding the cogency of Lord Greene's recent observations of regret at this survival from a time when moral objections to divorce a vinculo made this procedure inevitable and indispensable,[40] it is conceived that, as the law stands at present,

[40] [1948] P. 100, 110.

the High Court is bound by statute to proceed as far as conformable to the principles administered by the ecclesiastical tribunals and cannot presume, without legislative sanction, to effect such a revolutionary change in the administration of matrimonial remedies, however desirable a re-orientation may appear on broader principles. The form of the decree indeed is not merely a matter of adjective law but of substance, as has been vividly demonstrated by repeated decisions affirming the illegitimacy of offspring of voidable marriages.[41] The reversal of this latter rule by means of assimilation to divorce has never been conceived possible within the realm of a judicial revision. Thirdly, for the sake of clarity, the categorical difference in function between the respective proceedings calls for renewed emphasis, though in this context from a different perspective. Whereas in suits of dissolution the court is exercising sovereign authority in the coercive sense, in nullity it merely purports to give judicial recognition to the invalidity of a juristic act. There are no 'causes' of nullity in the same sense as in divorce. To say, therefore, that 'the causes of annulment of a voidable marriage, for example impotence, in no way affect the validity of a marriage until they are made the basis of a decree'[42] is to put an a priori assertion in the form of an argument which lacks all substance. Its most significant implication was in truth repudiated when the Court of Appeal in *De Reneville* v. *De Reneville* decided that the validity of marriage, both with respect to alleged impediments entailing complete nullity and mere voidability, must be tested by reference not to the lex fori or the law of the present domicile as in divorce, but by the lex domicilii at the time of the putative marriage. Similarly, the apposition of terms like 'void, voidable and dissoluble marriages'[43] should be eschewed because such terminology conceals the lack of common denomination of these juristic concepts and facilitates the process of arriving at fallacious deductions from the premise of an incorrect assumption. While the description of the first two relations both corresponds to legal usage and is analytically correct, it is erroneous to refer to a marriage as 'dissoluble' for the purpose of indicating that a cause has arisen which would entitle one of the spouses to a decree. In the words of Lord Brougham, directed to a not dissimilar submission in *Warrender* v. *Warrender*,[44] 'the doctrine confounds with the

41 *Dredge* v. *Dredge* [1947] 1 All E.R. 29; *L.* v. *L.* [1949] 1 All E.R. 141; *Treby* v. *Treby* (1939) 87 L.J.Newsp. 77. Cf. also *Newbould* v. *Att.-Gen.* [1931] P. 75; *Mason* v. *Mason* [1944] N.Ir. 134.

42 R. H. Graveson, 12 Conveyancer (N.S.) at p. 188.

43 *Per* Bucknill L.J. in *Casey* v. *Casey* [1949] 2 All E.R. 110, 115.

44 (1835) 2 Cl. & F. 488, 534.

nature of the contract that which is only a matter touching the jurisdiction of the courts'. Fourthly, the argument under discussion appears inescapably influenced by a confusion between the respective spheres of jurisdiction and choice of law. Although it has not been questioned that the status approach inherent in the decision of *Salvesen's Case* derives its validity from considerations which are applicable to both void and voidable marriages, yet the fallacy has gained some currency that the distinction between them for jurisdictional purposes is justified on the ground that in cases of voidability the forum must also apply the lex domicilii to the substantive issue raised by the petition just as in divorce. This sequence of reasoning is open to a twofold objection. In the first place, it seeks to elicit a rule of jurisdiction from the inapposite premise of the applicable choice of law rule, which has already been the subject of criticism in respect of the related postulate in favour of the locus celebrationis basis for the purpose of proceedings where the impediment consists in want of observance of formalities. More materially, however, it is attributable to an insufficient analysis of the meaning to be given to the 'law of the domicile'. That verbal symbol signifies the lex domicilii of the parties at the time of the marriage and not their personal law subsisting at the date of the proceedings as in divorce, because the decree in void as well as voidable marriages is, at least theoretically, based on the existence of ante-nuptial defects.[45] In contrast the decision in *Salvesen's Case* established, or perhaps reaffirmed, the jurisdictional competence of the courts of the domicile subsisting at the time of the proceedings. This is clearly shown by the Scottish case of *Murison* v. *Murison*,[46] where the parties had been married at Edinburgh while domiciled in Scotland, but had at the time of the action for declarator of marriage acquired a domicile of choice in Natal. The refusal to entertain jurisdiction in these circumstances on the basis of domicile not only represents a decision which is believed to reflect the true principle as followed by English courts, but also repudiates the dependency of the jurisdictional factor on the 'rule of reference' which is implicit in the contentions both of Somervell L.J. for restricting competence of the locus celebrationis to cases where the validity of the ceremony is in issue, and of the advocates of the *Inverclyde* doctrine in relation to voidability.

For these principal reasons the submission is respectfully advanced that, if the competence of the forum loci celebrationis is retained in cases of absolute nullity, the decision in *Inverclyde* v.

[45] See the present writer's observations in 11 Mod.L.R. 108–112.
[46] 1923 S.C. 624.

Inverclyde should be rejected as unsound.[47] It was not followed in the cases of *Easterbrook* and *Hutter* which repudiated any distinction, for purposes of jurisdiction, between the various kinds of nullity proceedings, and, although these were undefended petitions, Pilcher J. in the latter instance sought the assistance of the King's Proctor and subjected all aspects of the problem to a meticulous investigation. His judgment seems to imply, however, that the parties' residence provided a basis of jurisdiction in nullity suits only if the marriage had also been celebrated in England. This suggestion will be reserved for subsequent discussion, but it suffices in this context to observe that its converse application is unsupported by authority. The jurisdictional competence of the locus celebrationis had never previously been made dependent upon the additional factor of residence. In *Simonin* v. *Mallac* the respondent was resident at Naples, in *Sottomayor* v. *De Barros* in Portugal, and in *Linke* v. *Van Aerde* the court expressly considered this requirement to be immaterial. Similarly, the judgments in *Casey* v. *Casey*, in so far as approbating this jurisdictional basis, do not lend support to Mr. Justice Pilcher's qualification, which must be regarded as an unsuccessful attempt to establish a tenable basis of jurisdiction by the fusion of two criteria which, standing by themselves, have not proved altogether satisfactory.

III

With reference to petitions alleging the 'complete' nullity of marriage, the competence of the locus celebrationis was not seriously disputed even subsequently to the decision in *Salvesen's Case*, and continued to be accepted without argument[48] until Bucknill L.J. for the first time tentatively questioned its propriety in *De Reneville* v. *De Reneville* on the ground that it was 'difficult to see what interest that country would have . . . in matrimonial status'.[49] A regret may be expressed that the opportunity was lost in *Casey* v. *Casey* of giving practical effect to these misgivings by categorically repudiating the contractual basis of nullity jurisdiction as an outmoded relic of superseded conceptions in the Conflict of Laws. Its condemnation on the second ground that 'such a court might be extremely inconvenient to both parties'[50] is more difficult to comprehend in view of the fact that it has not, at least in modern law, been claimed as exclusive. Quite to the contrary, the primary

[47] This view is also advanced in Cheshire's third edition, pp. 440–449. Andrews L.C.J. observed in *Mason* v. *Mason* [1944] N.Ir. 134, 154: 'I find it difficult to appreciate Mr. Justice Bateson's proposition on legal or historical grounds'.

[48] *Hussein* v. *Hussein* [1938] P. 159; and see Lord Goddard in *Simons* v. *Simons* [1939] 1 K.B. 490, 498.

[49] [1948] P. 100, 122.

[50] *Ibid.*

advantage of its retention seems to lie in the circumstance that the alternative tribunals available to the parties may not in certain contingencies prove to be readily accessible. The additional, though obscure, hint that the courts of the country of celebration may be resorted to *only* ' where there is no common or matrimonial domicile in fact ', had already been voiced by Lord Jamieson in *MacDougall* v. *Chitnavis*,[51] but ignores the long line of decisions in which jurisdiction was entertained in England on this basis in respect of parties both of whom were domiciled in one and the same foreign country. Moreover, the extension of jurisdictional competence to the courts of domicile of either petitioner or respondent in such circumstances weakens the necessity of resorting to this expedient to overcome a dilemma which is another unfortunate legacy of the disastrous decision in *Ogden* v. *Ogden*.

In *Casey* v. *Casey*, Bucknill L.J. reinforced his earlier strictures on considerations of convenience by reference to the specific circumstances of the case before him, and suggested as an alternative ground for decision that the wife ought to have initiated proceedings whilst on her temporary visit to Canada, and her failure to do so ' tipped the scales of hardship ' in favour of the husband. It may, no doubt, be highly inconvenient for a respondent to defend a suit outside the country of his residence, but this feature may apply with equal force to proceedings before the courts of domicile. Unless, however, this is a valid objection to the jurisdiction of the locus celebrationis generally, it may well be asked why the position should be materially affected by the accident that the petitioner might have been able to commence proceedings before a competent court elsewhere in conditions more favourable to the respondent, but, instead, preferred to resort to a forum which, from a practical point of view, proved less convenient to the other party? This is a novel and questionable application of the principle of ' forum conveniens ' in a sphere where the spirit of the maxim ' boni judicis est ampliare jurisdictionem ' has previously been given singular prominence.

The Court of Appeal in *De Reneville* v. *De Reneville* did not, subject to what has been observed already, question the competence of the locus celebrationis to sustain proceedings in cases of voidability, although the reasoning of Bateson J. in *Inverclyde* v. *Inverclyde* was the subject of favourable comment for the purpose of establishing that a woman acquires her putative husband's domicile as the result of entering into a voidable, as distinct from a void marriage. The decision in *Hutter* v. *Hutter*, which had been

[51] 1937 S.C. 390. *Vide infra.*

based partially on the female petitioner's separate domicile, escaped condemnation because competence was, at any rate, vouchsafed by the parties' residence in England at the time of the proceedings. Although the judgments do not contain any express reference to the circumstance that the marriage in question had also been contracted in England, the implicit approval of the conclusion reached by Pilcher J. is proof that the Court of Appeal was not prepared to indorse the jurisdictional differentiation between proceedings in respect of voidable and void marriages. This impression is confirmed by a recent observation by Lord Merriman in *Harthan* v. *Harthan*,[52] and represents the view expressed by Somervell L.J. in *Casey* v. *Casey*. It is the more regrettable that the *Inverclyde* doctrine has now commended itself to Bucknill L.J. so as to perpetuate a conflict of views which it was hoped had been settled in a contrary sense by the court in *De Reneville* v. *De Reneville*.

IV

Scottish authorities on the propriety of the locus celebrationis basis are of direct assistance since the Court of Session considers itself bound by the same common law principles of jurisdiction in nullity as are professed by English courts.[53] In the early case of *Dodds* v. *Westcomb* [54] jurisdiction was sustained in an action for declarator of marriage on the ground that the marriage in question had been contracted in Scotland, but the reasoning was based on an unsubstantiated fear [55] lest an English court, seized of the issue, would decide the substantive question in accordance with English internal law. The similarity of this argument to that advanced in *Ogden* v. *Ogden* is almost inescapable. After reconsideration, the Scottish courts refused to adhere to this basis of jurisdiction in *Scruton* v. *Gray* [56] and *Wylie* v. *Laye*,[57] both actions of declarator of marriage, on the ground that the defender had not also been served in Scotland, and it was not until the beginning of the present century that the principle was reluctantly disinterred, presumably as a result of its continued recognition in England. Jurisdiction in nullity was assumed on this ground in *Miller* v. *Deakin*,[58] *Lendrum* v. *Chakravati*,[59] and *MacDougall* v. *Chitnavis*,[60] but in the second of

[52] [1948] 2 All E.R. 639, 652.
[53] Cf. Lord Sands in *Salvesen's Case*, 1926 S.C. 598, 619.
[54] (1745) M. 4793.
[55] Unsubstantiated in view of Sir E. Simpson's judgment in *Scrimshire* v. *Scrimshire* (1752) 2 Hagg.Con. 395.
[56] (1772) M. 4822.
[57] (1834) 12 S. 927. See also the ambiguous ruling in *Longworth* v. *Yelverton* (1862) 1 M. 161, and (1868) 7 M. 70.
[58] 1912, 1 S.L.T. 253.
[59] 1929 S.L.T. 96.
[60] 1937 S.C. 390.

these cases the court was careful to stress that there only remained a ' slender platform ', and the last decision left the question substantially unanswered. There a marriage had been celebrated in Scotland between an Indian and a Scotswoman. The latter petitioned for its annulment on the ground of error, but her contention was rejected on a point of substantive merit by overruling *Lendrum* v. *Chakravati* on this particular issue. The jurisdictional competence of the court was challenged before Lord Jamieson, who pointed out that the authority of the locus celebrationis to entertain proceedings for nullity rested alone on the decision of *Simonin* v. *Mallac* which had been criticised, though on a different point, in *Salvesen's Case*, and on a dictum by Brett L.J. in *Niboyet* v. *Niboyet*,[61] suggesting that the courts of the domicile were never competent, this proposition having been expressly rejected by Lord Haldane in the House of Lords.[62] Nevertheless, the learned judge should have recalled that Lord Sands, in his dissenting judgment in the Court of Session in *Salvesen's Case*,[63] had suggested the possibility of concurrent jurisdiction with the forum loci celebrationis, and that Lord Dunedin had expressly intimated his complete agreement with the views expressed in that judgment. Thus Lord Phillimore's ambiguous dictum was in fact largely neutralised. Lord Jamieson, however, thought that the basis of the locus celebrationis might be retained in cases, such as the one before him, where the woman's domicile was not in law identical with that of her putative husband. On appeal, his decision was sustained, and Lord Normand also doubted whether the courts of domicile were not exclusively competent.[64] Jurisdiction was allowed, however, on the grounds that (a) the action was undefended,[65] and (b) the decision was on the substantive issue in favour of upholding the marriage.[66] The second support of this conclusion requires extraordinary ingenuity to justify, and is unlikely to commend itself as a precedent of general authority. Likewise, the proposition that in undefended suits the court enjoys a greater latitude has in the past no doubt frequently served as a convenient method of justifying socially desirable, though legally unwarranted, conclusions,[67] but must be rejected as equally untenable.[68]

[61] (1878) 4 P.D. 1, 19.
[62] [1927] A.C. 641, 654.
[63] 1926 S.C. 598, 620.
[64] 1937 S.C. 390, 401; *pace* Lord Morison.
[65] *Per* Lord Normand at p. 401; *per* Lord Moncreiff at p. 405.
[66] *Per* Lord Normand at p. 401.
[67] Cf. *White* v. *White* [1937] P. 111, 125; *Easterbrook* v. *Easterbrook* [1944] P. 10, 11; *De Reneville* v. *De Reneville* [1947] P. 168; *Robert* v. *Robert* [1947] P. 164, 167.
[68] *De Reneville* v. *De Reneville* [1948] P. 100, 113.

The judgment in *Key* v. *Burnett*,[69] and certain dicta in *Wylie* v. *Laye*,[70] led to the assertion that Scottish courts can sustain proceedings only if the marriage had been solemnised in Scotland *and* the defender is resident there at the time of service.[71] That proposition, which enjoyed Lord Fraser's support, was upheld by the Inner House in *Murison* v. *Murison*,[72] in effect overruling *Dodds* v. *Westcomb* and *Mackenzie* v. *Mackenzie*.[73] The Lord President, however, expressly limited the purview of his judgment to actions for declarator of marriage,[74] with the result that a seemingly unjustifiable and highly artificial distinction between these suits and proceedings for nullity in the strict sense has been engrafted on Scots law.

V

In Canada, the centre of controversy is the decision in *Inverclyde* v. *Inverclyde*, but the courts have hitherto felt no hesitation to sustain jurisdiction on the contractual basis in respect of absolutely void marriages, in reliance on Dicey's venerated Rule 65. As instances of this practice may be mentioned *Hinds* v. *McDonald*,[75] a case of duress, as well as *Spencer* v. *Ladd*[76] and *Gower* v. *Starrett*,[77] in both of which the ground for decree was the respondent's previous and still subsisting marriage. Prior to 1931, the same rule was applied to petitions based on impotence,[78] but Mr. Justice Bateson's distinction subsequently found favour on repeated occasions. Thus, in *W.* v. *W.*[79] and *Fleming* v. *Fleming*,[80] decrees pronounced by the courts of the province where the marriage had been celebrated but in which the parties were not domiciled, failed to be accorded extraterritorial recognition on the ground that jurisdiction in relation to impotence was exclusive to the domicile, and in *Diatchuk* v. *Diatchuk*[81] the Manitoba Court of King's Bench refused to sustain proceedings for the same reason. This principle,

[69] (1780), rep. Fraser, vol. 2, p. 1272.
[70] (1834) 12 S. 927.
[71] See also Lord Sands in *Salvesen's Case*, 1926 S.C. 598, 620.
[72] 1923 S.C. 624.
[73] Unreported, March 8, 1810.
[74] 1923 S.C. 624, 641. Cf. Lord Jamieson in *MacDougall* v. *Chitnavis*, 1937 S.C. 390, 395.
[75] [1932] 1 D.L.R. 96.
[76] [1948] 1 D.L.R. 39.
[77] [1948] 2 D.L.R. 853.
[78] *G.* v. *G.* (1928) 22 Sask. 376; *Reid* v. *Francis* [1929] 4 D.L.R. 311. These decisions hardly bear the interpretation suggested by Bucknill L.J. in *Casey* v. *Casey* that the courts regarded impotence as entailing absolute nullity and not voidability. *Shaw* v. *Shaw*, *infra*, was not apparently cited to the Court of Appeal.
[79] (1934) 42 Man.R. 578.
[80] [1934] Ont.W.N. 487.
[81] [1941] 2 D.L.R. 607. Adamson J. failed to state reasons.

at least formerly, appeared to enjoy Falconbridge's approval,[82] but has not been accepted by Professor Read.[83] The distinction between void and voidable marriages for purposes of jurisdiction has recently been emphatically rejected in British Columbia. Notwithstanding the contrary view taken by Farris C.J. in the court below [84] the Court of Appeal in *Shaw* v. *Shaw* [85] expressly intimated, *per* Robertson and Sidney Smith JJ.-A., that the courts of the locus celebrationis were competent to pronounce a decree of nullity for impotence concurrently with those of the parties' domicile or residence, and it is noteworthy that Farris C.J. on a more recent occasion [86] revised his earlier contention and stated his agreement with the view of the Court of Appeal that jurisdiction in respect of voidable marriages was not exclusive to the domicile.

In the province of Quebec, the decision of *Salvesen's Case* was given a wider scope than in any other jurisdictional area of the British Commonwealth when the Banque de Roi in *Main* v. *Wright* [87] considered itself bound by Lord Phillimore's observation to restrict jurisdiction in all proceedings of nullity to the courts of the domicile and refused to sustain a petition brought on the ground of ' bigamy ', although the marriage had been contracted within the province.

It remains to add that Australasian courts have found little opportunity to clarify their attitude towards the jurisdictional problem in nullity. In Victoria and New South Wales there is authority favouring the competence of the locus celebrationis, at any rate in respect of petitions based on absolute nullity. In *Corbett* v. *Adamson*,[88] Madden C.J. followed *Simonin* v. *Mallac*, although not with unqualified conviction, but in *Smart* v. *Maxwell*,[89] Owen J. expressed his agreement with the unreserved approbation of this jurisdictional basis by the New Zealand court in *Gagen* v. *Gagen*.[90] More recently, in the Queensland case of *Lougheed* v. *Clark*,[91] the question of jurisdiction in relation to voidable marriages was mooted, apparently for the first time. Mansfield S.P.J. set aside a writ against a respondent who was at all material times domiciled in New South Wales notwithstanding the celebration in Queensland of the marriage which the petitioner

[82] [1932] 4 D.L.R. 32–35; but see *Conflict of Laws*, chap. 42, and 26 Canad.Bar R. 907, where the author has considerably modified his earlier views. A similar, but more explicit, change occurred between Cheshire's second and third editions.
[83] *Recognition of Judgments*, 243 ff.; also J. H. C. Morris, *Cases* (1939), 179.
[84] [1945] 1 D.L.R. 413.
[85] [1946] 1 D.L.R. 168.
[86] *Gower* v. *Starrett* [1948] 2 D.L.R. 853.
[87] [1945] B.R. (K.B.) 105.
[88] (1894) 20 Vict.L.R. 278.
[89] [1930] W.N. (N.S.W.) 100.
[90] [1929] N.Z.L.R. 177, 180–1.
[91] [1948] Q.L.R. 157.

sought to impeach on the ground of her husband's impotence. The learned judge reached his conclusion in reliance on selected passages from the judgments of the Court of Appeal in *De Reneville* v. *De Reneville* which would barely seem to support the suggested interpretation that jurisdiction in these cases is restricted to the domicile, but the decision itself anticipated that of the Court of Appeal in *Casey* v. *Casey* and more particularly the judgment delivered by Bucknill L.J. In view of the fact that Australian courts are almost invariably content to abide by English precedents, in contrast to the more vigorous independence noticeable in Canada, these contributions are necessarily negligible.

J. G. FLEMING.[92]

(To be concluded.)

[92] Lecturer in Law, Canberra University College, Australia.

THE SUPPRESSION OF SLAVERY IN INTERNATIONAL LAW

I

CONSEQUENT upon a report by its Third Committee (U.N. document A/783) the General Assembly of the United Nations at its 211th plenary meeting on May 13, 1949, adopted the following resolution :

'The General Assembly requests the Economic and Social Council to study the problem of slavery at its next session.' (A/877.)

The problem was debated during the ninth session of the Council in July, 1949, and the outcome of this debate was the adoption of an amended United Kingdom resolution by eleven votes to none with seven abstentions (E/1454) by which

'The Economic and Social Council

Instructs the Secretary-General, after consultation with the bodies having special competence in this field, to appoint a small ad hoc committee of not more than five experts :

1. To survey the field of slavery and other institutions or customs resembling slavery;

2. To assess the nature and extent of these several problems at the present time;

3. To suggest methods of attacking these problems;

4. Having regard to the recognised fields of competence of the various bodies within the framework of the United Nations, to suggest an appropriate division of responsibilities among these bodies; and

5. To report to the Council within twelve months of their appointment.'

With these resolutions the United Nations resumed the work in a field which had played an important part in the business of the League of Nations.

The problem of slavery with all its accompanying evils is unfortunately not yet 'on the point of completely disappearing'. There are the facts disclosed in Lady Simon's book on *Slavery* (London, 1929), in the Geneva Special Studies on *The Suppression of Slavery* (vol. 2, No. 4, April, 1931), in League of Nations documents to be mentioned in the present inquiry and even by a reply of Mr. Eden in the House of Commons as recent as 1943 (392 H.C.

Deb. (5th Ser.), p. 254) regarding the alleged sale of a number of people as slaves, among them two British protected persons.

The then British Foreign Secretary replied to a questioner that from the government concerned he had received the assurance that no *British protected* person had been sold as a slave and that all possible steps would be taken to prevent the smuggling of slaves from overseas. He pointed out, however, that ' owing to disturbed conditions on the South Persian coast in the last two years there has unfortunately been a slight recrudescence of the smuggling of slaves to the Arabian coast '.

Reports of the League's Temporary Slavery Commission, of the Advisory Committee of Experts on Slavery and the literature on the subject of which the quoted two books are but examples, make us aware of the great duty still incumbent on society in the interest of our civilisation.

The words of Sir William Scott in *Le Louis* (1817) 2 Dods. 210; 165 E.R., are today as true as when they were spoken. He was referring to the slave-trade when he said (at p. 256): ' To every man it must have been evident that without a general and sincere concurrence of all the maritime states, in the principle and in the proper modes of pursuing it, comparatively but little of positive good could be acquired, so far at least, as the interests of the victims of this commerce were concerned in it . . . '.

The Scope of the Present Study

The present study is exclusively concerned with the problem of slavery in international law. It assumes a state of affairs where both slavery and the slave-trade have been suppressed as institutions of municipal law throughout the civilised world.

Consequently, there is no reason to deal with anti-slavery legislation except in so far as it impinges upon international law as was, *e.g.*, the case with regards to the provisions of the British Slave Trade Act, 1824 (5 Geo. 4, c. 113) which declared certain forms of the slave-trade to be piratical. It is necessary to remember that even the universal suppression of the slave-trade and slavery in municipal law does not automatically make either institution illegal in international law. This can be seen from the practice of States who in their municipal laws suppressed slavery and in the international field led the way in the making of conventions for the suppression of slavery.

The legal problem of the present inquiry arises from this discrepancy between the standard of municipal and the standard of international law.

The purpose of this article is to examine the present state of conventional international law against its historical background and to sketch in the background of customary international law only in so far as it is required for an understanding of the treaty material. Moreover, the customary law is here described in the form given to it by the English courts. Further research would be necessary for a full analysis.

The discussion of the various international compacts is preceded here by a short survey of customary international law in the manner just indicated. In the absence of conventions modifying customary international law it is this law which governs the problems dealt with in the present inquiry. Customary international law and the case law quoted in support of it are therefore of more than historic interest.

The suggestion of methods of attacking the problems here discussed is one of the tasks of the committee of experts to be appointed (point 3 of the E.C.O.S.O.C. resolution of July 26, 1949, document E/1454) and no attempt will be made to forestall their work. This notwithstanding, it will become apparent at the appropriate places of the discussion where there is need for provisions in international law conducive to the suppression of slavery and the slave-trade and other institutions or customs resembling it.

Throughout this article the terms ' slavery ' and ' slave-trade ' are intended to bear the meanings given to them in Article 1 of the Convention of Slavery, signed at Geneva on September 25, 1926 (League of Nations document C. 586. M. 223. 1926. VI. 60 League of Nations Treaty Series 253, No. 1414, A.J.I.L. 21 (1927), Suppl. 171); that is to say :

(1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

(2) The slave-trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

Slavery in Customary International Law

English and American case law on the subject of slavery shows the attitude of the judges to this problem and throws light on the practice of the executive from which the state of international law can be inferred. Of particular interest are cases where express reference is made to international custom.

A detailed study of United States case law of the period before the Civil War might possibly reveal further material which by way of analogy might serve to elucidate international law. The incompatibility of the slave-trade and slavery outside the jurisdiction with the public policy of a State opposed to slavery might throw light on international law and also on the discrepancy between municipal and international law. (See, *e.g.*, the judgment of Shaw C.J. of Massachusetts, who affirms that slavery is not contrary to international law, though contrary to natural law, and draws the consequences in a habeas corpus case, *Commonwealth* v. *Aves* (1836) 18 Pick. 193.)

Apart from the question of public international law, the attitude of the courts of the major countries on the problem of public policy in connection with the conflict of laws deserves to be examined, because it forms the background to the development of international law itself. Here the most remarkable phenomenon is the difference between slavery as an institution of the law of property and the contract for the sale of a slave. A comparison of two cases to be mentioned in this chapter will illustrate this point. The two cases referred to are *Somerset* v. *Stewart* and *Santos* v. *Illidge*.

The case of the slave Somerset presently to be quoted contains an interesting dictum on the validity of a contract for the sale of a slave in eighteenth century England, which supports the contention that international law at that time did not yet forbid slavery, or the slave-trade. Otherwise the case turns on the admissibility of the exercise of a dominium over a human being on English soil.

In *Somerset* v. *Stewart* (1772) Loft. 1; 98 E.R.; 20 State Trials 1, there was an application for habeas corpus requiring the captain of a ship in English territorial waters to show cause for the seizure and continued detention of the complainant Somerset, a negro slave held by the captain on the order of the negro's master, who had purchased him on the African coast and now intended to bring him to Jamaica in order to sell him there. The complainant was discharged. Lord Mansfield observed (at p. 19): 'The state of slavery is of such a nature that it is incapable of being introduced by any reason, moral or political . . . it is so odious that nothing can be suffered to support it, but positive law'. But he also admitted that had the suit been in contract, different considerations would have applied. 'A contract for the sale of a slave is good here; the sale is a matter to which the law properly and readily attaches' (p. 17).

Likewise, the common law does not tolerate slavery on board an

English ship. The sovereign right of a foreign State to permit slavery is, however, expressly recognised.

In *Forbes* v. *Cochrane* (1824) 2 B. & C. 448; 107 E.R., the plaintiff sued the defendants, two British naval officers of high rank, for having enticed, received and harboured his servants. As these servants were not servants by contract, but slaves, 'these men, when on board an English ship, had', according to the judgment, 'all the rights belonging to Englishmen . . . ' (p. 467). This followed from *Somerset's Case*, which applied to English soil as well as to English men-of-war.

Best J. concluded his judgment: ' . . . if slavery be recognised by any law prevailing in East Florida, the operation of that law is local. It is an anti-Christian law and one which violates the rights of nature and, therefore, ought not to be recognised here. For these reasons I am of opinion that our judgment must be for the defendants'.

The legality of a contract for the sale of a slave in a country where such sale was not illegal, was upheld in England as late as 1860 in *Santos* v. *Illidge and Others* (1860) 8 C.B.(N.S.) 861; 141 E.R.

It follows from a comparison of the *Somerset Case* with that of *Santos* v. *Illidge*, that slavery is contrary to English public policy, but that public policy is not strong enough to affect the validity of a contract for the sale of a slave subject to *foreign* law. In other words: the illegality of the slave-trade is said to rest entirely on statute (cf. Martin Wolff, *Private International Law*, London, 1945, who holds (p. 182) that *Santos* v. *Illidge* would certainly be decided differently today).

Where the executive identifies itself with a person interfering with the 'property' of a foreign slave-trader, an English court will grant him no remedy: *Buron* v. *Denman* (1848) 2 Ex. 167.

The problem of international law proper usually arose in cases concerning visit, capture and search. The following cases discussed below, *viz.*, the English cases of the '*Amedie*' (1810) 1 Acton 240; 12 E.R.; '*Africa*' (1810) 2 Acton 1; 12 E.R.; '*Anne*' (1810) 2 Acton 6; 12 E.R.; '*Fortune*' (1811) 1 Dods. 81; 165 E.R.; '*Diana*' (1812) 1 Dods. 95; 165 E.R.; '*Le Louis*' (1817) 2 Dods. 210; 165 E.R., and the American case of the '*Antelope*' (1825) 10 Wheaton 66; Briggs 12, have in common the fact that a slave-trader had been intercepted on the high seas and the right to visit, search and capture was contested.

In order to understand the situation in international law it is well to remember the general background of the matter, especially as far as the rights of visit, search and capture are concerned.

Higgins and Colombos (*The International Law of the Sea*, London, 1943, pp. 206, 283, 554 ff.) enumerate the following occasions where, on the high seas, a right over ships not flying the same colours as oneself may be exercised.

(1) As against an enemy in war belligerent rights can be exercised on the high seas just as on land. This point does not require further comment.

(2) For the prevention of carrying contraband, warships of belligerents, duly commissioned, can visit and search any merchant vessel even in convoy on the high seas and within the territorial waters of the belligerents. Neutral territorial waters and neutralised portions of the sea are excepted.

(3) The rights of a belligerent's aircraft to visit and search is doubtful.

(4) When armed violence has been committed at sea or even—according to the principles underlying the Privy Council decision in the case *Re Piracy Jure Gentium* [1934] A.C. 586—where there was a frustrated attempt to commit robbery, the perpetrators are pirates and come under the jurisdiction of the captor State. It is, however, quite clear, and has been stressed in the '*Louis*' (1817) 2 Dods. 210; 165 E.R., that the carrying of slaves is not to be construed as piracy, and in the '*Felicidade*', *R.* v. *Serva and Others* (1845) 1 Den. 103; 169 E.R., that the mere fact of slave-carrying does not make it lawful for the Crown to put itself into possession of the ship.

(5) By convention a right of visit and search can, of course, be granted. Examples are the Convention of the Supervision of the International Trade in Arms, etc., Geneva, June 17, 1925 (A. 13. 1925. XX) or the U.S.–British Treaty for the Prevention of Smuggling of Intoxicating Liquors into the United States of January 23, 1924.

(6) Exceptionally, international maritime usage permits the warships of all nations to exercise the 'right to approach' (enquête ou vérification du pavillon), but this right extends only to verifying the nationality of the ship.

To this list there should be added as a further point:

(7) The right of visit and search can presumably also be exercised against a vessel not protected by the flag of a State in existence for the prevention of the infringement of immigration laws: *Naim Molvan* v. *Att.-Gen.* ((1948) 98 L.J. Newsp. 245).

From this it seems to follow that the suspicion or even the established fact that a ship is engaged in slaving, does not confer any rights upon the vessels of other nations on the high seas. This is also the view of writers.

Westlake (1 *International Law*, Cambridge, 1904, p. 166) sums up the position with regard to the slave-trade thus : ' For the detection and suppression of the slave-trade there is no right of visit and search by general law, but only by treaty between States which have conceded it to one another in their just hatred of that traffic '. To this Hall (*A Treatise on International Law*, Oxford, 1924, p. 321) adds : ' By the municipal law of many countries acts are deemed piratical and are punished as such which are not reckoned piratical by international law. Thus, the slave-trade is piratical in England and the United States, and in France the crew of an armed vessel navigating in time of peace with irregular papers become pirates upon the mere fact of irregularity without the commission of any act of violence. It is scarcely necessary to point out that municipal laws extending piracy beyond the limits assigned to it by international custom affect only the subjects of the State enacting them and foreigners doing the forbidden acts within the jurisdiction.'

In England this view of international law rests on a solid foundation of judicial authority.

There is one point of very great general interest which emerges from the cases starting with the ' *Amedie* '. It is that the legality or otherwise, in international law, of the capture is made to depend on the domestic law of the flag. Quite apart from the general interest of this matter as a doctrine affecting the inter-relation between international and municipal law, the following deserves consideration. If capture and search are justified in international law, provided slavery is prohibited by the laws of the flag of both vessels (the one capturing and the one captured), it appears to follow that if slaving were made illegal by the municipal laws of all seafaring nations, capture and search, by reason of suspected slaving, would become lawful as a matter of customary international law.

In the ' *Amedie* ' (1810) 1 Acton 240; 12 E.R., the facts were that at the time of capture by a British ship the vessel ' Amedie ' was employed in carrying slaves from the coast of Africa to a Spanish colony. It was held by Sir William Grant that since Parliament had declared the slave-trade to be contrary to the principles of justice and humanity, this trade was prima facie illegal. The claimant had to prove that the flag-State of the ship protected such trade, and that in violation of such law he was deprived of his property. As he was an American citizen, the ship had to be condemned, because Congress had declared the foreign slave-trade illegal by an Act of 1794.

This case was followed in the ' *Africa* ' (1810) 2 Acton 1 ; 12 E.R. The American vessel ' Africa ' laden with slaves was captured by a

British ship on January 30, 1808. As American law prohibited the slave-traffic, the court condemned ship and cargo.

In the '*Anne*' (1810) 2 Acton 6; 12 E.R., the facts were that on January 6, 1807, a British ship captured an American vessel with a cargo of slaves bound from the coast of Africa (where she had touched at several settlements of different European nations for the purpose of obtaining slaves) to Montevideo. The vessel was brought for adjudication to the Cape of Good Hope, where it was decreed that ship and cargo should be restored on payment of the captor's expenses. On appeal, Sir William Grant held that, following the '*Amedie*', ship and cargo must be condemned, as the slave-trade was contrary to the Act of Congress of 1794 prohibiting the foreign slave-trade.

In the '*Fortuna*' (1811) 1 Dods. 81; 165 E.R., a vessel owned by an American citizen sailed from New York to Madeira, where it was ostensibly sold to a Portuguese subject for the sole purpose of acquiring the right to the Portuguese flag, and renamed 'Fortuna'. This vessel was captured by a British ship and brought to Plymouth for adjudication. From the mere inspection of the vessel, which was fitted with platforms for the accommodation of slaves, iron shackles, bolts, running chains and collars, it appeared that the object of the voyage was to procure a 'cargo' of slaves on the coast of Africa. It was held that, a vessel brought in for adjudication which has engaged in slave-trading is liable to condemnation as prize, unless the owner proves that, according to the law of the flag-State, the slave-trade is legal. As the court said: 'If the ship should therefore turn out to be an American actually so employed . . . the case of the "*Amedie*" will bind the conscience of this court to the effect of compelling it to pronounce a sentence of confiscation'.

In the '*Diana*' (1812) 1 Dods. 95; 165 E.R., on September 11, 1810, the ship was seized by a British vessel after having taken on board a number of slaves at Cape Mount on the coast of Africa. There was nothing to disprove that ship and cargo were Swedish property. The Vice-Admiralty Court at Sierra Leone condemned the ship. This judgment was reversed on appeal. Sir William Scott observed (at p. 99) that in the '*Amedie*', 'the Lords of Appeal did not mean to set themselves up as legislators for the whole world, or to presume in any manner to interfere with the commercial regulations of other States, or to lay down general principles that were to overthrow their legislative provisions with respect to the conduct of their own subjects'. And at p. 101 he observed further: 'The court is certainly inclined to hold that it lies on the individual making the claim to show that the law of his country countenances the trade; but in this particular instance . . . the endorsement upon

the pass signed by the Swedish governor that this vessel was " bound to the coast of Guinea *for slaves* " raises the presumption of the legality of the trade, and shifts the burden of proof from the claimant to the captor '.

In the two cases which follow, the intercepted slave-traders were subjects of States whose laws permitted the trade. The courts therefore in both cases denied the right to interfere with this trade. In the ' *Louis* ' it was stressed that the slave-trade cannot be held to be piracy, and no rights similar to those obtaining against a pirate can be exercised against a slave-trader, while in the ' *Antelope* ' the legality of slavery and the slave-trade in customary international law was stressed.

In ' *Le Louis* ' (1817) 2 Dods. 210; 165 E.R., the ship was taken off Cape Mesurada on the coast of Africa on March 11, 1816, by an English colonial armed vessel after the ship had resisted visit and search. She was brought to Sierra Leone and there condemned by the Vice-Admiralty Court of that colony on proof that she had been engaged in slave-trading. On appeal this judgment was reversed. It was held that there exists in customary international law, apart from the rights of belligerents and against pirates, no right of visit and search on the high seas. Such right has been established as a means of self-defence only. In peace-time it can be exercised only against a pirate. A pirate is primarily characterised by the lack of a national character legally obtained. The ' Louis ', however, had French papers and was indeed part of the French mercantile fleet. Sir William Scott observed (at p. 247) : ' I think it requires no labour of proof to show that such an occupation [*viz.*, slave-trading] cannot be deemed a legal piracy. . . . It is not the act of . . . enemies of the human race . . . , but of persons confining their transactions . . . to particular countries. . . . (At p. 250) : Under the light of Christianity itself, the possession of persons . . . acquired [*viz.*, through the slave-trade] has been in every civilised country invested with the character of property. . . . The notorious fact is that . . . many thousands of persons are held as legal property, they and their posterity.'

Neither French law nor even the Additional Article of the Definite Treaty of November 30, 1815—later to be mentioned in this article—abolished the slave-trade. The treaty did not inform the subjects that the trade was *hereby* abolished. The contracting Powers merely (a) informed each other that they had abolished the trade without stating the means, and (b) provided for future measures to be taken for universal abolition. No French law against the slave-trade did in fact exist at the time of the transaction, and the appeal had therefore to be allowed.

The conception of piracy (though still not including the slave-trade) is today at common law not restricted to acts of robbery at sea, and the decision in *Re Piracy Jure Gentium* [1934] A.C. 586, may be taken as being indicative of a general legal principle recognised by civilised nations.

The attitude of the English courts in the cases just referred to, starting with the '*Amedie*' and leading to the '*Louis*', is also that of the United States Supreme Court. It suffices to refer to the famous opinion of Marshall C.J. in the '*Antelope*' (1825) 10 Wheaton 66, in which a Venezuelan privateer, manned by a predominantly United States crew, captured off the African coast one United States, several Portuguese, and one Spanish vessel (the 'Antelope'), and took from all negro slaves. She was wrecked off the coast of Brazil. Her crew was taken prisoner by the crew of the 'Antelope' and, together with the slaves, they were transferred to that vessel. A United States revenue cutter brought the ship with the crew and about 280 negro slaves to a United States port for adjudication. The slaves were claimed by the captain of the 'Antelope', by the Portuguese and Spanish Vice-Consuls as property of the subjects of their respective nations, and the United States Government, because they had been transported by United States citizens in contravention of American law. The court dismissed the claims of the captain of the 'Antelope' and of the United States Government, except as to the slaves taken from the United States vessel. The residue was divided between the Spanish and Portuguese claimants.

Marshall C.J., in delivering judgment, observed that the conflicting claims were those of 'the sacred rights of liberty and of property', and that the slave-trade 'has been sanctioned in modern times by the law of all nations who possess distant colonies . . . authorised and protected by the laws of all commercial nations . . . claimed by each and allowed by each'. Consequently, as the slave-trade was 'consistent with the law of nations, it cannot in itself be piracy'. Therefore, 'it is almost superfluous to say in this court that the right of bringing in for adjudication in time of peace, even where the vessel belongs to a nation which has prohibited the trade, cannot exist'.

As mentioned above, the line of English cases from the '*Amedie*' to the '*Louis*', and the American case of the '*Antelope*', show that customary international law is taken in the municipal laws of England and the United States to refer to the flag-State of a slave-trader in order to determine the lawfulness or otherwise of his business, and the consequent right of an intercepting vessel to visit, search and capture.

But it is submitted that this right is not understood to exist by virtue of treating the slave-trader as a pirate (notwithstanding the extension of this term by the 1934 Privy Council decision in *Re Piracy Jure Gentium*) but for a reason additional to those enumerated by Higgins and Colombos.

This attitude towards international law is reflected not only, as shown above, in the English principles of the conflict of laws with regard to contract and property, but also in the law of tort and in criminal law.

The case of *Madrazo* v. *Willes* is interesting from more than one point of view. It will be recalled that in the '*Louis*' it was stressed that the rights exercisable against a pirate cannot be exercised against a slave-trader, and similarly, as in the '*Antelope*', the legality of slavery and the slave-trade in customary international law was pointed out. In *Madrazo* v. *Willes* (1820) 3 B. & A. 353, the plaintiff slave-trader, a Spanish subject, sued the defendant, a captain of the Royal Navy, for having, on January 16, 1818, on the high seas seized his vessel and cargo. The plaintiff was awarded damages which included £18,180 for the supposed profit of the 'cargo' of slaves. Best J. referred to the '*Fortuna*', the '*Diana*', and the '*Amedie*', and concluded (at p. 359): 'It is clear from the authorities that the slave-trade is not condemned by the general law of nations'. Bayley J. observed (at p. 357): 'Although the language used by the legislature . . . is . . . very strong, yet it can only apply to British subjects, . . . it cannot apply . . . to a foreigner. It is true, that if this were a trade contrary to the law of nations, a foreigner could not maintain this action. *But it is not.*'

The case of *Buron* v. *Denman* (1848) 2 Ex. 167; 154 E.R., already referred to, may be cited here in support of two propositions: first, English common law does not consider the slave-trade to be piratical and therefore illegal *by the law of nations*, and second, an English court will not consider tortious the interference by a British subject abroad with the rights a foreign slave-owner has under the local (foreign) law, provided the act complained of has been sanctioned or ratified by the Crown.

The defendant, a British naval commander with instructions to suppress the slave-trade, landed on an island off the West African coast in order to liberate two British negro subjects held there as slaves. In pursuance of this aim he destroyed the plaintiff's barracoons and some of his merchandise and liberated over 800 slaves. The Lords of the Admiralty and the Foreign and Colonial Secretaries adopted and ratified the defendant's acts. Parliament voted for the defendant and his men in recognition of their services the sum of £4,000 (10 & 11 Vict. c. 107). In the course of his judgment

Parke B. referred (at p. 186) to the '*Louis*', and stated that (1) slave-dealers are not to be considered pirates by the law of nations, and can only be made so by a treaty with their home State; (2) slave-trading is not piracy jure gentium; (3) the right to visit and search exists only by virtue of an international treaty to that effect; and (4) if the slave-trader's home State forbids this traffic, it is not open to everyone to punish the offender. For these reasons the plaintiff might have maintained trespass. However, the ratification of the defendant's act by the Ministers of State was equivalent to a prior command and rendered it an act of State, for which the Crown alone was responsible.

The last two points, (3) and (4), in Baron Parke's judgment, contradict prima facie the principles underlying the decisions in the '*Amedie*', the '*Africa*' and related cases. Professor Keith in *Wheaton* (London, 1929, Vol. 1, p. 291) holds that these principles had been overruled in the '*Louis*'. It is, however, submitted that in the '*Louis*' and in *Buron* v. *Denman*, the unqualified dictum that no nation can, in the absence of an international treaty to that effect, lawfully exercise the rights of visit, search and capture, was obiter. Moreover, Sir William Scott in the '*Louis*' would not have arrived at a different conclusion, even if he had considered as binding the principle of the '*Amedie*', *viz.*, that visit, search and capture of a slave-carrying ship are legal, provided the slave-trade at sea is illegal by the law of the slave-trader's flag. In the '*Louis*' the flag referred to French law, which tolerated the trade and therefore made interference with it illegal.

In *Buron* v. *Denman* the dicta referred to above under (3) and (4) were also obiter, as the case was decided on entirely different grounds, *viz.*, on the fact of subsequent ratification of the Crown of an otherwise *generally* tortious act. The dictum in *Buron* v. *Denman*, that it is not open to everyone to punish a slave-trader, even if the trader's home State forbids the trade, need not be incompatible with the principles of the '*Amedie*', if the dictum is understood to refer to an interference with a slave-trader on land or in territorial waters only.

The attitude towards international law as here discussed is also reflected in criminal law.

The following case is cited in support of the contention that customary international law does not confer an unqualified right to visit and search a slave-trading vessel, still less one suspected of slave-trading, and the mere purpose of tracking down slave-traders or preventing their business gives no title to a slave-carrying ship, and does not make the possession of such ship legal.

The case in question is commonly known by the name of the

ship, the '*Felicidade*', and was reported under the name of *R.* v. *Serva and Others* (1845) 1 Den. 103; 169 E.R. On February 28, 1845, the 'Felicidade', a Brazilian slaver, surrendered to a British warship engaged in the pursuit of slave-traders. The 'Felicidade' was put under the command of a British officer, who chased and captured with her the 'Echo', a Brazilian vessel, with slaves on board. Some of the crew of the latter were transferred to the 'Felicidade', which was placed under the command of a British midshipman. The slave-traders in execution of a conspiracy killed the midshipman and the entire British crew. In a trial for murder the conspirators were found guilty, but on a case reserved for the opinion of the judges the conviction was held wrong on the ground of want of jurisdiction, as there was no proof that the possession of the 'Felicidade' by the Crown through the British officer had been lawful.

The present English attitude to the element of force in the definition of piracy is illustrated by *Re Piracy Jure Gentium* [1934] A.C. 586. On January 4, 1931, on the high seas, a number of Chinese nationals pursued in two boats a cargo vessel with the intent to rob it. Shots were fired on both sides, but eventually the pursuers were arrested and charged with piracy. After the full court of Hong Kong had declared that actual robbery was necessary to support a conviction of piracy, they were acquitted.

On November 10, 1933, the King in Council referred to the Judicial Committee the question whether a frustrated attempt to commit a piratical robbery is not equally piracy jure gentium. After commenting on authorities (starting with Grotius' 'De Iure Belli ac Pacis', 2, 20, 40, and an Act of Henry VIII of 1536, and ending with the report of the League of Nations Sub-Committee of Experts for the Progressive Codification of International Law—League of Nations document C. 196. M. 70. (1927)) the Board came to the conclusion that actual robbery is not an essential element in the crime of piracy jure gentium, and that a frustrated attempt to commit piratical robbery is equally piracy jure gentium.

The cases quoted in support of the dependence of the legality or otherwise of the slave-trade on the law of the slave-trader's flag, are obviously restricted to the high seas. Within territorial waters the littoral State claims jurisdiction to an extent which makes any interference with a slave-holder or trader unlawful by any Power other than the littoral State.

The extent of territorial waters lacks uniformity in international law. No State claims less than three miles; Great Britain and other States are, however, not prepared to concede more than this limit to other Powers. The limitation of territorial waters to three miles

was adopted by the United States as early as 1794, and in treaties with other Powers (*e.g.*, Germany, Holland and Japan) the United States reserved its right to the three mile limit. This position is supported by the Supreme Court. In the leading case of *Cunard S.S. Co.* v. *Mellon* (1923) 262 U.S. 100, the Supreme Court held as subject to United States jurisdiction the ports, harbours, bays, and other enclosed arms of the sea along its coast, and a marginal belt of the sea extending from the coastline outward a marine league (three geographical miles).

In Great Britain the Territorial Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), also provides for the three mile limit, measured from low water mark, to be within British territorial sovereignty. Germany has adopted a corresponding rule (Deutsche Prisenordnung of September 30, 1909, R.G.Bl. 1914, 279). With regard to France, 'there is no French law prescribing a uniform breadth of territorial waters for all purposes'. (Reply of the French Government to the League of Nations inquiry during the conference for the codification of international law, Geneva, 1929. League of Nations document, C. 74. M. 39. 1929. V. p. 28.) For certain purposes—*e.g.*, customs, safety and fisheries—France makes a wider claim (cf. Gidel, 3 *Le Droit International Public de la Mer*, Paris, 1934, pp. 101 ff., 441 ff., and 463 ff.).

Many States (*e.g.*, Sweden) claim sovereignty beyond the three mile limit. The lack of uniformity with regard to the extent of territorial waters can be seen from the answers to the League of Nations questionnaire just referred to. The Draft Convention providing for State sovereignty of the three mile zone was not adopted.

The right of hot pursuit is well established in customary international law. With the sole exception of Sweden there was unanimity among the Powers who replied to the League of Nations questionnaire that there is a right of continuation on the high seas of a pursuit begun within territorial waters. The only difference of opinion was on the question whether the entry of the pursued vessel into the territorial waters of another country merely suspended the pursuit or put an end to it.

It is therefore clear that no ship belonging to any but the littoral State can lawfully intercept a slave-carrying vessel within (at least) three miles from the shore, and any right of pursuit comes to an end—at least for the time being—within the same geographical limits.

Summarising, it can be said that in customary international law slave-holding is not unlawful. With regard to the slave-trade it appears from the cases quoted, especially the '*Louis*', that this trade is not piracy, even if we give the term the extended meaning

it has received in the case of *Re Piracy Jure Gentium*. There accrue, therefore, no rights against a slave-holder or slave-trader in customary international law. This notwithstanding, English courts assert, as can be seen from the line of cases starting with the '*Amedie*', the existence in international law of a right on the high seas to visit, search and capture a slave-carrying vessel, provided the flags of both vessels (the capturing and the one captured) are those of States the municipal laws of which forbid the trade.

There still remains to be considered the right of the slave-trader's home State to his ship and cargo, and its claim to jurisdiction over the slave-trader. As a slave-trader cannot be held to be a pirate, he cannot be made amenable to the courts of the captor State by any act short of piracy. He therefore remains for all acts done on the high seas subject to the jurisdiction of his own sovereign. With regard to any right to his ship and cargo it is submitted that the right of visit, search and capture on the high seas by the vessel of any Power of a slave-trading ship the country of which forbids the trade, has grown into international custom which was generally practised at the time when the extent of the slave-trade at sea made such interception worth while.

On land and within territorial waters international law does not permit the interference with either slavery or the slave-trade by anyone but the local sovereign. This is the obvious consequence of his sovereignty. Even the fact that, as happened in *Buron* v. *Denman*, the trespass becomes an act of State and therefore not tortious within the framework of municipal tort law, does not make it lawful in international law.

The preamble of the 1885 Berlin General Act (76 *British and Foreign State Papers* 4; A.J.I.L. 3 (1909), Suppl. 7) asserts that international law as recognised by the signatory Powers forbids the slave-trade. This is obviously not in keeping with the principles found in Anglo-American case law and State practice. The preamble to the Berlin General Act also distinguishes between the slave-trade and operations which furnish slaves to the trade. It appears that the assertion of the General Act as to the illegality of the slave-trade is correct to a limited extent only, *viz.*, only in so far as can be gathered from the ratio decidendi of the line of cases starting with the '*Amedie*'. In 1885 customary international law did not forbid the slave-trade, but made it, at least in the view of the English judges, merely prima facie unlawful.

The distinction between the slave-trade and operations which furnish slaves to the trade appears to be artificial and not well founded.

THE SUPPRESSION OF SLAVERY IN CONVENTIONAL INTERNATIONAL LAW : THE MEDITERRANEAN AND BLACK SEA AREAS

Before 1815 the European Powers made successful efforts to emancipate slaves of European descent held by some non-Christian States in the Levant and in North Africa. It is to England's credit that the keeping of Europeans in slavery was abolished in North Africa, while Russia was successful in rooting out the holding of European slaves in the Black Sea area.

In a conflict with a slave-trading nation in 1817 and 1818 Russia categorically declared that any slave entering her territory becomes automatically free.

It is to the credit of the Northern States of the U.S.A. (or some of them, *e.g.*, Massachusetts) that they eliminated slavery in their own territories before it was done in Europe or in European colonies.

These efforts—often supported by force—led to treaties with non-European Powers, some of which, however, proved to be more progressive than their contemporaries in Europe. Sir Robert Phillimore (1 *Commentaries upon International Law*, London, 1879, at p. 406) observes : ' In January, 1846, the Bey of Tunis addressed a circular to the Consuls of Christendom, announcing the abolition of slavery throughout his kingdom—an act which surely shamed the slave holding States of Christendom '.

Before 1815, however, the endeavours of the great Powers were merely directed against the keeping of slaves of European descent.

THE SUPPRESSION OF THE WEST AFRICAN SLAVE-TRADE

The humanitarian tendencies directed against the West African traffic in negro slaves to the Americas found their expression for the first time in the history of international law in the condemnation of slavery in principle in Article 1 of the *Additional Articles between France and Great Britain*, signed in Paris, May 30, 1814 (1 (1) *British and Foreign State Papers* 172). This runs as follows : ' His Most Christian Majesty, concurring without reserve in the sentiment of His Britannic Majesty, with respect to a description of traffic repugnant to the principles of natural justice and of the enlightened age in which we live, engages to unite all his efforts to those of His Britannic Majesty, at the approaching Congress [of Vienna], to induce all the Powers of Christendom to decree the abolition of the slave trade, so that the said trade shall cease universally, as it shall cease definitely, under any circumstances, on the part of the French government, *in the course of five years*; and

that, during the said period, no slave merchant shall import or sell slaves, *except in the colonies* of which he is a subject '.

Following this Additional Article, the *Eight-Power Declaration* regarding the general abolition of the negro slave-trade of February 8, 1815 [Appendix 15 to the General Act of the Vienna Congress (*ibid.*, 971)] merely declares that ' the public voice . . . calls aloud for ' the suppression of ' this traffic ' and that ' all the Powers possessing colonies . . . have acknowledged . . . the duty and necessity of abolishing it '. In the *Additional Article of November* 20, 1815, to the Definitive Treaty between Great Britain, Austria, Prussia, Russia and France (3 *ibid.*, 292) the Powers engaged ' to renew conjointly their efforts, with the view of securing final success to those principles which they proclaimed in the Declaration of the 4th (*sic*) February, 1815, and of concerting, without loss of time . . . the most effectual measures for the entire and definite abolition of a commerce so odious and so strongly condemned by the laws of religion and nature '.

Neither the Additional Articles of 1814 or 1815, nor the Eight-Power Declaration of 1815 declared slavery or the slave-trade to be piracy or even illegal. On the contrary, the 1814 Article declared expressly legal for a period of five years the French colonial slave-trade, and there is nothing in the Eight-Power Declaration declaring illegal even a contract between subjects of the signatories for the selling of slaves. Not even the interference with slave-traders was legalised by any of these declarations. Even as a proclamation or pious wish these Articles and Declarations were directed only against the slave-trade and not against slavery as such.

It may be noted that in the ' *Louis* ' (1817) 2 Dods. 210; 165 E.R., the King's Advocate contended (at p. 235) : ' In whatever light the slave-trade may have been viewed in former times, it must no longer be deemed within the protection of the law of nations, especially since the declaration signed by the ministers of the different European Powers assembled in Congress at Vienna, that the trade was *repugnant to the principles of humanity and universal morality. From that period at least, a traffic in slaves must be considered a crime* . . . '. In his judgment, however, Sir William Scott refuted this argument (at p. 252) with these words : ' Much stress is laid upon a solemn declaration of very eminent persons assembled in congress, whose rank, high as it is, is by no means the most respectable foundation of the weight of their opinion that this traffic is contrary to all religion and morality. Great as the reverence due to such authorities may be, they cannot, I think, be admitted to have the force of overruling the established course of the general law of nations '. By two *Conventions between Great*

Britain and France, signed at Paris, November 30, 1831 (18 *British and Foreign State Papers* 641), and March 22, 1833 (20 *ibid.*, 286), to which a number of European Powers adhered, the mutual right of visit and search of merchant vessels of both nations was given to warships of both countries within well defined geographical limits. It was, however, expressly stipulated that vessels seized on the ground of participation in the slave-trade or on suspicion of being fitted out for that traffic, should be given up to the jurisdiction of the courts of their own State and be judged only according to the laws in force in their own country. A convention between Great Britain and France signed at London on May 29, 1845 (33 *British and Foreign State Papers* 4), abrogated the treaties of 1831 and 1833, and with them the mutual right of visit and search. Consultations for the conclusion of further conventions were envisaged.

The *Treaty of London*, 1841, though signed by France was not ratified by her, and Great Britain and France remained bound by the two treaties of 1831 and 1833 until their abrogation in 1845. This treaty, signed December 20, 1841 (30 *British and Foreign State Papers* 269 and 298), by Austria, Great Britain, France (which, as just mentioned, did not ratify), Prussia and Russia for the Suppression of the African Slave-trade ('Quintuple Treaty'), was a milestone in the history of the suppression of slavery. Belgium adhered February 24, 1848 (36 *ibid.*, 397), while the Treaty was extended to the whole of Germany, March 29, 1879 (70 *ibid.*, 34).

In the Treaty of London, Austria, Prussia and Russia (and later Belgium and Germany) undertook

(1) to prohibit the slave-trade carried on (a) by their subjects, (b) under the respective flags, or (c) by means of capital belonging to their subjects, and

(2) to declare such trade piracy.

These Powers declared at the same time that the mere attempt to carry on the slave-trade should have as a consequence the loss of any right to the protection of their respective flags (Article 1).

It is submitted that the mere engagement of the Powers to declare the slave-trade to be piracy, and even the fulfilment of this engagement did not make it so jure gentium even with regard to vessels sailing under their respective flags. A pirate, *i.e.*, a sea-robber without the right to sail under any recognised flag, is a 'hostis humani generis', and as such amenable to the courts of any State whose ship intercepts the pirate. (See the discussion on piracy in the chapter on customary international law.) Even the further provision that a slave-trader shall not be protected by the flag of any of the signatories does not make the slave-trader a pirate,

because Article 10 provides for trying those guilty of the trade in a court of the flag-State (see also Annex 2 of the treaty, point 5.)

(3) Within strictly defined geographical limits (Article 2) warships of the contracting Powers were given the right to search and detain merchant vessels but not warships (Article 4) of any other contracting Power on reasonable suspicion of being or on the same voyage having been engaged in slave-trading. Ships in convoy were excepted. The right of search was in such case reserved to their own warships (Article 7).

(4) The treaty provided for rebuttable presumptions that the vessel was engaged in slave-trading : *viz.*, the existence on board of extra food, decks, shackles, water, etc. (Article 9).

(5) A vessel suspected of slave-trading had to be brought to a port of the flag-State (Annex B to the treaty) for adjudication and punishment.

In case of confiscation and subsequent sale of the vessel the purchase money was to be placed at the disposal of the government of the captor-State (Article 10). The latter had the right of pre-emption (Article 12).

(6) Illegal search made the government of the captor-State liable in damages (Article 13).

Several months before Lincoln, as commander-in-chief of the United States Forces, issued his famous proclamation of September 17, 1862, calling on the revolting confederate States to return to the Union, stating their slaves would otherwise be declared free, the United States concluded an anti-slavery treaty with Great Britain, which was followed by the Emancipation Proclamation of January 1, 1863, freeing all slaves of the Confederates. On January 31, 1865, two months before actual hostilities in the Civil War had come to an end, Congress adopted the Thirteenth Amendment to the Constitution abolishing slavery throughout the Union, and by December 18, 1865, this amendment had been ratified and was in force.

By the *Treaty of Washington* between Great Britain and the United States (52 *British and Foreign State Papers* 50), signed April 7, 1862, and ratified in London on May 20, 1862, the two Powers granted each other, again within well defined territorial limits (Article 1, para. 4), the reciprocal right of visit and search to be exercised by warships against merchant vessels sailing under the flags of either Power. As in the Quintuple Treaty certain prima facie evidence as to slave-trading made detention lawful (Article 6). The treaty provided for mixed tribunals (Article 4), but the punishment of slave-traders was left to the courts of the nation to which the offender belonged (Article 9). In case of condemnation of the detained vessel it was to be declared a lawful prize and sold by

public auction for the profit of both governments (Article 6, Annex B to the treaty). Illegal detention rendered the government of the captor-State liable to pay indemnity (Article 3).

Those who recall the Peace Treaty of Utrecht of 1713 (the so-called Assiento Treaty) whereby England secured a monopoly for the importation of African negro slaves to the Spanish colonies in America, a trade which had been started by Portugal in 1443 (1 Martens, *Völkerrecht* 329) should not forget England's leading role in the international suppression of slavery from the nineteenth century onwards. To this end she concluded a large number of treaties with European and non-European Powers as well as with native chiefs. As in the Quintuple Treaty and the Treaty of Washington, many of these conventions provided for a mutual right of visit and search. These treaties were concluded with a view to suppressing the maritime slave-trade, especially between the west coast of Africa and the Americas.

As a consequence of municipal legislation in the countries on the American continent and the active steps taken by the Powers in pursuance of the treaties mentioned, the slave-trade between the West African coast and the American continent declined during the last quarter of the nineteenth century.

A list of the treaties mentioned is given in De Martens et De Cussy, *Recueil de Traités et de Conventions, etc.*, V, 436 ff., and in 1 Phillimore, *International Law*, 420 ff.

Many of these treaties have been formally abrogated. But even before their formal abrogation they were considered obsolete once the circumstances had disappeared under which they had been concluded. The exchange of notes between the British Ambassador in Rio de Janeiro and the Brazilian Foreign Minister of June 29 and July 16, 1921 (10 *League of Nations Treaty Series* 467, No. 279), is characteristic of others. To the notification of denunciation of the Slavery Abolition Treaty between Great Britain and Brazil of November 23, 1826, by the former, the Brazilian Foreign Minister replied that ' since the middle of the last century the Brazilian Government has considered the Treaty to be valueless and it does not figure in the collection of existing international Acts published in 1900 under the title of " The Brazilian Foreign Code " '. Similar answers to British notifications came from Colombia (116 *British and Foreign State Papers* 91), Ecuador, The Netherlands, Norway and Sweden (*ibid.*, 118), Haiti (*ibid.*, 161), and Chili (*ibid.*, 196). For further renunciations see the alphabetical index to *The League of Nations Treaty Series*, 1–30, pp. 816 ff.

Great Britain announced that these treaties of indefinite duration had ceased to have effect from the date on which each of the treaty

partners replied favourably to the notification. Although these treaties had become obsolete through circumstances, they were treated as binding (at least by the British Government) up to the date of the receipt of the treaty partner's consent to abrogation.

From this it follows that even vital changes in circumstances did not produce a lapse, but only the mutual recognition by the treaty partners that circumstances had changed. The same principle was applied in the case of the British–United States Treaty which provided for termination by denunciation upon notice of one year. The United States adopted the date of the British notification as the beginning of this period (116 *British and Foreign State Papers* 160).

The Fight Against the East African and Central African Slave-trade

The measures stipulated in the conventions mentioned in the preceding chapter were mainly designed to stop the slave-trade at sea. For the suppression of slave-raids and the slave-trade from the east coast of Africa to the Orient these measures had to be supplemented. At the Berlin Conference, 1885, it was declared in Article 9 of Chapter 2 of the General Act of the Conference at Berlin of February 26, 1885, ratified April 19, 1886 (76 *British and Foreign State Papers* 4, English translation in A.J.I.L. 3 (1909), Suppl. 7) that : ' Seeing that trading in slaves is forbidden in conformity with the principles of international law as recognised by the signatory Powers, and seeing also that the operations which, by sea or land, furnish slaves to the trade ought likewise to be regarded as forbidden, the Powers which do or shall exercise sovereign rights or influence in the territories forming the Conventional basin of the Congo declare that these territories may not serve as a market or way of transit for the trade in slaves of any race whatever. Each of these Powers binds itself to employ all means at its disposal for putting an end to this trade and for punishing those who engage in it '. If the nineteenth century English and U.S.A. decisions represent international law, this preamble does not conform to it. Whether such treaty declaration creates international law for the future (*e.g.*, by way of estoppel) is doubtful.

The Berlin General Act was signed by Austria-Hungary, Belgium, Denmark, France, Germany, Italy, The Netherlands, Portugal, Spain, Sweden and Norway, Turkey, Great Britain, the United States and Russia, and ratified by all but the United States, who, in conformity with the Monroe doctrine, were unable to commit themselves to duties in respect of the territorial integrity and

neutrality of distant regions where it had no established controls or interests.

The Berlin Conference was followed by the Conference of Brussels where, on July 2, 1890, the General Act of that Conference (82 *British and Foreign State Papers* 55, English translation in A.J.I.L. 3 (1909), Suppl. 29) was signed by Austria-Hungary, Belgium, the Congo, Denmark, France, Germany, Italy, The Netherlands, Persia, Portugal, Russia, Spain, Sweden and Norway, Turkey, Great Britain, the United States and Zanzibar. The Brussels General Act was ratified by all signatories, the United States disclaiming, however, any intention to indicate by their ratification any interest in the possessions or protectorates established or claimed in Africa by the other Powers.

The General Act of the Brussels Conference of 1890 is the most comprehensive treaty against the slave-trade and bound most of the signatories until 1919, and some even beyond that date. To suppress the slave-trade the General Act provided in a hundred articles for military and economic measures such as the establishment of military stations and the improvement of communications (Articles 1, 2, 15–17), and for criminal legislation (Articles 5 and 19). A series of provisions dealt with the liberation of escaped slaves (Article 18), and with the prevention of the introduction of arms and ammunition to districts infested with slave-raiders.

By the Brussels General Act the parties bound themselves (Articles 5 and 19) to enact within one year criminal laws against—

(1) those committing grave offences against the person,

(2) organisers and abettors of slave-hunting,

(3) those committing mutilations of males,

(4) capture of slaves by violence,

(5) the carriers, transporters, and dealers in slaves, and

(6) accessories of those coming within (1) to (5).

However, the Brussels General Act, recognised expressly the existence of domestic slavery and merely bound Powers under whose municipal laws domestic slavery was a recognised status, to prohibit the importation, transit, departure, and trade in slaves (Article 62).

Turkey (Article 68), Persia (Article 69), and Zanzibar (Article 70) bound themselves to help in the suppression of the trade.

The other provisions of the Brussels General Act were optional. They provided for—

(1) Measures to be taken in the countries of origin (Chapter I, Articles 1–14). Among these was the organisation of effective communication. Strong points were envisaged (Article 1, p. 2) for the

protection of fugitive slaves, missionaries and explorers, the suppression of cannibalism and human sacrifice and help for the natives; defence, agriculture and industry; flying columns to support repressive action against slave-traders and protect the security of the highways (Article 1, No. 6). The import of certain firearms was forbidden (Article 1, No. 7).

(2) Chapter II (Articles 15–19) provided for the interception of slave-caravans and the liberation of slaves.

(3) Chapter III dealt with the repression of the slave-trade by sea. Article 22 gave the Powers the right to visit and search, but this right was again limited

(a) geographically to a zone defined in Article 21, and

(b) with regard to the vessels to be searched, only vessels under a certain tonnage (500 tons) (Article 23), and

(c) to be exercised only against a vessel flying the flag of one of the signatories (Article 45). This again supports the contention that in customary international law there is no right to visit and search on suspicion of slave-trading.

(4) Chapter V, Section I, is of importance in that it established an International Bureau in Zanzibar (Articles 27 and 74 ff.) for information purposes. The Act provided for the deposit of documents specified in Article 41; licences to native vessels to carry a flag; crew lists; negro passenger lists; and (Article 77) lists of authorities empowered to take proceedings against vessels suspected of slave-trading or misuse of the flag; copies of judgments and condemnations; and information that might lead to the discovery of persons engaged in the slave-trade.

(5) Chapter V, Section III, dealt with the protection of liberated slaves; Article 86 provided for the establishment of liberation offices in the zones delimitated in Article 21 (see *supra*, 3 (a)). These offices were to deliver letters of release and keep a register thereof (Article 87).

(6) Chapter VI (Articles 90–95) provided for measures to restrict the traffic in spirituous liquors.

(7) In Article 96 it was provided that ' The present General Act repeals all contrary stipulations of conventions previously concluded between the signatory Powers.'

The importance of the Brussels General Act of 1890 is twofold. Firstly, in pursuance of their commitments the signatories enacted legislation against the slave-trade and slave-hunting, although it was not always as comprehensive as stipulated in the General Act. Secondly, the General Act did not remain a piece of dead

international legislation, but it was implemented by practical means, *viz.*, by executive action. On the other hand, however, the Brussels General Act expressly recognised certain forms of slavery (Chapter IV), did not declare slave-trading piratical, and thirdly, did not provide for a *general* right to visit and search.

H. FISCHER.[1]

(*To be concluded.*)

[1] London.

THE CONTROL OF CORPORATIONS

Application of the Enemy Test in the United States of America

Since World War I, the determination of the enemy character of corporations has been the concern of many countries, both belligerent and neutral. A corporation came under the jurisdiction of legislation on enemy property when it was controlled by enemies, *i.e.*, when it was managed by individuals or representatives of corporations who themselves were considered enemies. It was the English courts which first applied this new concept of ' piercing the corporate veil '.[1] The control test was then adopted by the Peace Treaties of 1919 and applied by the Mixed Arbitral Tribunals established after the First World War.[2] The United States of America did not adopt the control test during the First World War. American courts refused to recognise the concept whereby American-registered corporations could be considered enemies and thus subject to the domestic legislation on enemy property.[3] Such refusal did not operate merely by withholding enemy-controlled property in American corporations from treatment as enemy property, but it prevailed also in instances where American shareholders (Standard Oil Company of New Jersey) of an enemy-registered corporation (Deutsch-Amerikanische Petroleum-Gesellschaft at Hamburg, Germany) did not succeed in having their beneficial ownership of tankers exempted from treatment as enemy property since ' most doctrine and nearly all jurisprudence . . . in all countries accord to the legal entity known as a company a personality and a patrimony entirely distinct from those of its shareholders '.[4]

World War II revived the problem. It was a known fact that German and other enemy interests were often concealed through

[1] *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co.* (*Great Britain*), *Ltd.* [1916] 2 A.C. 307; *Re Badische Co., Ltd.* [1921] 2 Ch. 331. See Oppenheim, *International Law* (6th ed., by Lauterpacht, 1944), p. 221; Webber, *The Effect of War on Contracts* (2nd ed., 1946), p. 120; McNair, *Legal Effects of War* (3rd ed., 1948), p. 63.

[2] For cases see *Annual Digest and Reports of Public International Law Cases, Years 1919–1942* (ed. by Lauterpacht, 1947), p. 472; Schwarzenberger, *International Law*, Vol. 1 (2nd ed., 1949), p. 177.

[3] *Fritz Schulz, Jr., Co., Inc.* v. *Raimes & Co.*, 166 N.Y.Supp. 567 (1917); *Behn, Meyer & Co.* v. *Miller*, 266 U.S. 457 (1925); *Hamburg-American Line Terminal and Navigation Co.* v. *United States*, 277 U.S. 138 (1928).

[4] *Standard Oil Co. Tankers Case*, *American Journal of International Law*, vol. 22, pp. 404, 411 (1928). For an historical survey see Moore, ' Beneficial Ownership of Property as Affecting its Nationality ' in *Collected Papers*, Vol. 5, pp. 224, 257 (1944).

affiliations with American or neutral corporations. It was not only by legal ownership of stock that a material influence could be exercised on the management of such corporations, but also by long-term loans, options, a contractual or personal relationship and a variety of other methods of control. To defeat the widespread use of the corporate structure in concealing enemy interests, the trading with the enemy legislation of World War II established the control test by statutory provisions in various countries and determined, to various degrees, the incidents of control.[5] Court decisions were rendered on the basis of such newly enacted statutory provisions in determining the enemy character of domestic and neutral corporations.[6]

The United States did not join these other nations, and the amendments to its Trading with the Enemy Act failed to apply the control test.[7] Again, as in the period following World War I, courts refused to apply this concept, whereby an enemy character may be attributed to an American corporation or to a corporation registered in a non-belligerent country by a determination of the enemy nationality of the controlling stockholders.[8] In measures of economic warfare, however, such as the blocking of foreign funds and the blacklisting of corporations of neutral countries, the control test was applied to determine the enemy character of corporations. Court decisions sanctioned such administrative practice.[9] More

[5] For a survey of statutory provisions in various countries see Domke, *Trading with the Enemy in World War II*, p. 127 (1943), and *The Control of Alien Property*, p. 100 (1947). As to legislation enacted in liberated countries see, *e.g.*, Art. 81A of the Dutch Decree on Enemy Property of October 20, 1944, Staatsblad No. E. 133; Stoffels, 'Vijandelijk Vermogen en Voklenrecht' in *Nederlands Juristenblad*, 1949, pp. 377, 393.

[6] England: *Part Cargo ex M.V. Glenroy* [1945] A.C. 124; *Lowenthal* v. *Att.-Gen.* [1948] 1 All E.R. 295; *International Law Quarterly*, Vol. 2, p. 92 (1948). Australia: *Re G. Hardt & Co. Pty., Ltd.* (1940) 13 Australian L.J. 425. Union of South Africa: *Overseas Trust Corp., Ltd.* v. *Godfrey*, South African L.R. [1940] Cape P.D. 177. France: *S.A. Les Parfums Tosca*, Dalloz Heb., 1940, 11; *Société Somatex, ibid.*, 22. Argentina: *Merck Quimica Argentina S.A.* v. *Gobierno Nacional*, *Jurisprudencia Argentina*, Vol. 3, p. 280; *Revista Argentina de Derecho Internacional*, Vol. 10, p. 219 (1947).

[7] More recently, s. 32 (*a*) of the Trading with the Enemy Act, as amended August 8, 1946, permitted the return of vested property to persons not hostile to the United States, *inter alia*, when the owner was not 'a foreign corporation or association which at any time after December 7, 1941, was controlled or 50 per centum or more of the stock was owned by any person or persons ineligible to receive a return'.

[8] *Toa Kigyo Co.* v. *Offenberger*, *New York Law Journal*, February 14, 1942, p. 687: stockholders of an American corporation were non-resident Japanese nationals and the manager was a resident Japanese national. *H. P. Drewry, S.A.R.L.* v. *Onassis*, 291 N.Y. 779 (1943): majority stockholder of a French registered corporation was a British subject who fled to England when France was occupied; see also 188 Misc. 912 (1947).

[9] It was said in *119 Fifth Avenue, Inc.* v. *Taiyo Trading Co., Inc.*, 73 N.Y.S. 2d 774, 775 (1947): 'Though a domestic corporation, defendant was a foreign national, since a majority of its stock was owned by nationals of an enemy country'.

recently, the Supreme Court of the United States definitely approved of the control theory. In *Clark, Att.-Gen.* v. *Uebersee Finanz-Korporation, A.G.*,[10] dealing with a Swiss corporation alleged to be controlled by German interests, namely those of the family of the auto-industrialist Fritz von Opel, the court said : ' The property of all foreign interests was placed within reach of the vesting power not to appropriate friendly or neutral assets but to reach enemy interests which masqueraded under those innocent fronts. . . . The power of seizure and vesting was extended to all property of any foreign country or national so that no innocent appearing device could become a Trojan horse '. This decision, however, did not determine to what degree control of a neutral (Swiss) corporation through enemy influence would constitute an enemy taint. The case was remanded to the District Court, which held [11] that various factors contributed to the existence of such enemy taint : (1) the Opel parents, who resided in Germany, owned an usufructuary interest (Niessbrauch) in the American securities bought by the Swiss corporation; (2) unusual circumstances surrounded Fritz von Opel's citizenship of the Principality of Liechtenstein; and (3) there were connections between this neutral citizen and enemy interests through stock ownership in a Hungarian mining corporation which shipped bauxite to Germany during the war. The control theory was thus established in the United States first through the administrative treatment of alien property in World War II, after which it was finally recognised by the federal courts. The permission given by the courts to look behind the corporate veil ' opens new vistas of " cloaking " litigation. Cloaking may be concisely defined as an attempt to cover enemy property in the United States with a cloak of apparent non-enemy ownership; and its forms are as various as the ingenuity of enemy financial and economic experts would allow —which is very various indeed '.[12]

The application of the control theory with regard to property located in the United States became of greater practical importance with the adoption of the most recent amendment to the Trading with

[10] 332 U.S. 480 (December 8, 1947), *American Journal of International Law*, Vol. 42, p. 470 (1948).

[11] 82 F.Supp. 602 (U.S. District Court, District of Columbia, February 21, 1949).

[12] Bishop, ' Judicial Construction of the Trading with the Enemy Act ', in *Harvard L.R.*, Vol. 62, pp. 721, 753 (1949). In *Filipinas Compania de Seguros* v. *Christern, Huenefeld & Co., Inc.*, dealing with the invalidity of a fire insurance policy in view of the controlling interests in the respondent corporation by Germans and Dutchmen residing in German-occupied territory, and of the ' public enemy ' qualification under the Philippine Insurance Law, No. 2427, as amended, the decision of the Court of Appeals of the Republic of the Philippines of May 31, 1948, relied expressly on the earlier American decisions (*supra*, n. 3). Consideration of the *Uebersee* decision (*supra*, n. 10) has been requested in a renewed petition for *certiorari* pending before the Supreme Court, G.R. No. L–2294.

the Enemy Act, which provides that no vested German and Japanese property ' shall be returned to the former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein '.[13] When establishing the enemy character of domestic or neutral corporations was a pre-requisite for the liquidation of war-time measures regarding vested enemy property, it became imperative for the United States to apply the control theory also in international agreements.

The Agreement of May 25, 1946, between the United Kingdom, the United States and France with Switzerland, concerning the Liquidation of German Property in Switzerland,[14] provides in its Annex IV (B2) for the liquidation of property interests in Switzerland possessed by German nationals residing in Germany through organisations under non-German ownership or control. Consequently, the Swiss-American Agreement of November 22, 1946, terms an enemy any corporation ' situated within any foreign country which is a national of Germany, Japan, Hungary, Rumania, or Bulgaria *by reason of the interest therein of any government or person* specified in this paragraph '.[15] Thus, the control test has been recognised as the principle of determining the enemy character of neutral-registered corporations, and appears similarly in the Agreements on liquidation of German assets in Sweden of July 18, 1946 (' corporations in which Swedish nationals have a substantial ownership interest '),[16] and in Spain of May 10, 1948.[17]

Of greater importance in developing a general application of the control test is the Brussels Agreement of December 5, 1947, relating to the Resolution of Conflicting Claims to German Enemy Assets.[18] This multilateral agreement, dealing with the conflicting claims of alien property custodians of different countries to German external assets, specifically considers property owned by Germans through enterprises organised under the laws of an Allied country. It provides in Article 11 (b) that an enterprise shall be deemed to be German controlled if German enemies hold directly or indirectly ' (i) 50 per cent. or more of the voting rights, outstanding capital stock or other proprietorship interests, or (ii) participating rights in a voting trust arrangement which rights represented 50 per cent. or

[13] Art. 39, added by s. 12 of the War Claims Act of 1948, Public Law 896 of July 3, 1948.
[14] *Department of State Bulletin*, Vol. 14, p. 1121 (1946); Switzerland, No. 1 (1946), Cmd. 6884.
[15] Italics supplied. See Swiss Bank Corporation, Bulletin No. 1–1947, p. 12.
[16] Treaties and other International Act Series 1657; Miscellaneous No. 12 (1947), Cmd. 7241.
[17] Treaties and other International Act Series 1773; Treaty Series No. 71 (1948), Cmd. 7558.
[18] *Department of State Bulletin*, Vol. 18, p. 6 (1948).

more of such voting rights, outstanding capital stock or other proprietorship interests; or if at the material date German enemies directly controlled the policy, management, voting power or operations of the enterprise '. The critical test for German interests in non-enemy corporations is thus set not only at German control of a minimum of 50 per cent. of the stock but is based also on other devices of management control. The same criterion of a German ' controlling interest ' in a corporation appears again in Part III of the Rules of Accounting for German External Assets, approved by the Assembly of the Inter-Allied Reparation Agency on November 21, 1947,[19] and in the British-French Agreement for the Settlement of Inter-Custodial Conflicts relating to German Enemy Assets of July 15, 1948.[20] The Brussels Agreement, which was signed by Belgium, Canada, the United Kingdom, the Netherlands, the United States and Luxembourg, has been ratified only by the Netherlands.[21] It is open for signature to the other thirteen members of the Inter-Allied Reparation Agency. This inclusion of the control test will enjoy an even greater importance than in most other agreements since any other country may send notice of its adherence and thereby become a party to the Brussels Agreement. Its principles are already applied in the practice of settling conflicting interests of the respective custodians of enemy property,[22] and thus became a basis for the uniform treatment of corporate property controlled by interests.

The control theory appears sometimes in a different aspect when corporations registered in enemy countries, thus being enemy corporations by virtue of their enemy nationality, have been controlled by nationals of countries of the United Nations. Such stockholdership constitutes sufficient reason to exempt these interests from any foreign administration of enemy property. The reason for exempting such interests from enemy characterisation is indeed obvious. Beneficial interests of United Nations nationals in enemy-registered corporations should not be sacrificed for German reparations. They should be exempt from the application of the term ' German external assets ' under the various reparation agreements. In furtherance of this policy, the Final Act of the Paris Conference on Reparations from Germany of January 14, 1946, provided in its Annex 3 (b) [23] that :

[19] Report of the Secretary-General for the Year 1948, Annex, p. 91.
[20] Treaty Series No. 74 (1948), Annex, art. 12 and 19.
[21] A Joint Resolution (H.J.Res. 294) of July 7, 1949, approving the Brussels Agreement was not enacted during the First Session of the 81st Congress.
[22] *E.g.*, see the case of the American Bemberg Corporation, Annual Report, Office of Alien Property, Department of Justice, for the Fiscal Year ended June 30, 1948, p. 34.
[23] Cmd. 7173. Military Government—Germany, Law No. 75 of November 10, 1948, regarding the Reorganisation of German Coal and Iron and Steel Industries, *Department of State Bulletin*, Vol. 19, p. 704 (1948), exempts, in s. 14, from

' In general, property belonging legitimately to a United Nation or to its nationals, whether wholly owned or in the form of a shareholding of more than 48 per cent., shall so far as possible be excluded from the part of German property considered to be available as reparation '. That policy has been reiterated in the Declaration of the British and French Governments in the aforementioned Agreement of July 18, 1948, as follows : ' Accepting that the burden of reparation ought to fall on Germany and not on Allied nationals, (the Governments) agree in principle that external capital assets of companies of German incorporation, in which there is a substantial non-German interest, should, so far as practicable, be excluded from the part of German property considered to be available as reparation '.

The control test was also adopted in the Peace Treaties with the Axis Satellite countries of February 10, 1947, with regard to certain compensation claims of United Nations nationals ' who hold, directly or indirectly, ownership interests in corporations or associations which are not United Nations nationals '.[24] The control theory was further recognised in Article 33 of the Peace Treaty with Rumania, which deals with compensation by the Rumanian Government ' for goods delivered by this Government on account of reparation and acquired from nationals of an Allied or Associated Power or *company owned by them* '.[25]

On the other hand, the control theory has been denied application recently in instances where its adoption would have been favourable to American interests. Article 34 (a) of the Trading with the Enemy Act, as amended, provides for the satisfaction of creditors out of property of their debtors which is located in the United States. Debt claims against vested assets shall include only those made by residents of the United States and by ' corporations

the reorganisation enterprises ' the share capital of which before September 1, 1939, was owned to the extent of more than 50 per cent. by United Nations nationals '. Similarly, the Report of the Inter-Governmental Group for the Safeguarding of Foreign Interests in Germany and the U.S. Memorandum of October 7, 1949, refer in s. 2 (equalisation of burdens) to ' the question of the treatment of companies not wholly owned by United Nations interests, but in which they have a majority holding ' : *Department of State Bulletin*, Vol. 21, pp. 576, 580 (1949).

[24] Italy : art. 74 (4b) ; Hungary : art. 26 (4b) ; Rumania : art. 24 (4b) ; Bulgaria : art. 23 (4b) ; Finland : art. 25 (4b). See Mann, ' German External Assets ', in *British Year Book of International Law*, Vol. 24, p. 239 (1948), and ' Enemy Property and the Paris Peace Treaties ' in *Law Quarterly Review*, Vol. 64, p. 492 (1948) ; Martin, ' Private Property, Rights and Interests in the Paris Peace Treaties ', in *British Year Book of International Law*, Vol. 24, p. 273 (1948) ; Drost, *Contracts and Peace Treaties* (The Hague, 1948), p. 57, and book review by Mann in *Modern Law Review*, Vol. 12, pp. 270, 271 (1949).

[25] Italics supplied. For incidents with regard to property of Romano-Americana, a Rumanian subsidiary of an American oil company, see Domke, ' Settlement-of-Disputes Provisions in Axis Satellite Peace Treaties ', in *American Journal of International Law*, Vol. 41, pp. 911, 918 (1947).

organised under the laws of the United States, or any State, territory or possession thereof '.[26] Thus, corporations registered in Allied or neutral countries in which Americans have shareholding interests are excluded from any benefits under that recent legislation, even to the extent of the proprietary interests of Americans.

The same is true in Western Germany, under the Third Law for Monetary Reform (Conversion Law)[27] which provides that United Nations nationals may object as creditors to the conversion of the debt into Deutsche marks. Article 13 (4) (ii) defines as United Nations nationals ' corporations or associations established under the law of any such nation, provided that the said corporations or associations also had this status on May 8, 1945 '. Here, too, in a recent regulation of far-reaching importance, the control test has not been applied in a situation where its application would have operated in favour of the interests of Americans and of other United Nations nationals in neutral corporations (registered in other countries than those of the United Nations). The mere registration of a corporation in a United Nations country, regardless of the nationality of the stockholders, prevails in both regulations. This again manifests the trend observed in other respects : the nationality of the beneficiary is less decisive than the relationship of the corporation to the national economy of the country concerned. In both instances, only American-registered corporations—forming a part of the American economy and being subject to domestic regulations—should profit from the benefits granted to American nationals.

Another instance wherein foreign controlling interests should be excluded from the application of the domestic legislation of the country in which the corporation is registered, involves beneficial ownership by foreigners in nationalised corporations. Here, the test for exemption from the effects of legislation adverse to such foreign beneficial interests will be stock ownership, whereas in the other area in which the control test is applied, namely, enemy control in American and neutral corporations, the scope had to be enlarged to many other devices of management control in order to prevent enemy cloaking from endangering the national economy in emergency situations. Thus the American Agreements on Compensation for Nationalisation of American Assets, concluded with Poland on April 24 and December 27, 1946,[28] with Czechoslovakia on November 14, 1946,[29] and with Yugoslavia on July 19, 1948,[30] provide for specific

[26] As added by Public Law 671 of August 8, 1946.
[27] American and British Military Laws No. 63, French Law No. 160, of June 21, 1948.
[28] Treaties and other International Acts Series 1516 and *Department of State Bulletin*, Vol. 16, p. 28 (1947).
[29] *Department of State Bulletin*, Vol. 15, p. 1004 (1946).
[30] Treaties and other International Acts Series 1803.

compensation of American stockholders and thus exempt, to a certain degree, those interests from the foreign nationalisation legislation. The same viewpoint prevails in the British-Poland Agreement concerning Compensation for British Interests affected by the Polish Nationalisation Law, of January 24, 1948,[31] whereby compensation is granted to British shareholders 'if the combined shareholding of United Nations nationals, whether held directly or indirectly, including holding through the medium of subsidiary companies, amounts to 90 per cent. or more of the total shareholding in the company', and also in the British Agreement with Yugoslavia, dated December 23, 1948.[32]

The control test to determine the enemy character of corporations proved an effective weapon of economic warfare in the two world wars. Its adoption by the United States not only extended its application in international agreements involving German external assets, but also facilitated its use in other arrangements to compensate foreign shareholders of nationalised corporations. Many questions will still be open for discussion in this new legal field of international economic relations. In the protection of national interests by diplomatic means and before domestic and international tribunals, it is submitted that the control test will become an important factor in the development and, at the same time, in the codification of the international law of private property.

MARTIN DOMKE.[33]

31 *International Law Quarterly*, Vol. 2, p. 544 (1948).
32 Treaty Series No. 2 (1949).
33 New York.

THE PROPER LAW OF THE CONTRACT

I

THE middle of the twentieth century is a time when it is fitting to take stock, to review achievements of the last fifty years, and to re-examine the soundness of their foundations. It is the fundamentals of legal doctrine to which one naturally turns in this spirit of reflection. The details, always subject to change and development, necessarily remain outside the scope of mid-century quest.[1]

One of the great doctrines of private international law which in the course of those fifty years has become almost universally established, is that commercial contracts are governed by their proper law, *i.e.*, by that legal system which, by their express or implied selection, the parties intend to apply. In an imposing number of decisions, almost too numerous to be completely collected, the English courts have again and again asserted and applied that subjective theory of the proper law. They have thus adopted and, indeed, guided a practice which, with the exception of a few countries,[2] prevails all over the world. It is a truly unique victory which the subjective theory of the proper law has attained in judicial practice and as a result of which the uniformity of law has been greatly fostered in an important field. For this reason alone it is desirable to propound the thesis that we should do nothing that could encroach upon the future prosperity of an idea that has become deeply embedded in the common heritage of the civilised world :

> Was Du ererbt von Deinen Vaetern hast,
> Erwirb es, um es zu besitzen.[3]

Yet of late a reaction has set in among scholars. After so many years of ascendancy it is not surprising that the principle should become subject to criticism, although it must be hoped that there will not develop in this country that pronounced, but regrettable cleavage between judicial practice and academic teaching which, in this branch of the law, existed for some time on the Continent.

[1] This article, therefore, does not contain that full collection of material which is usual, but with which the expert reader is familiar.

[2] Notably in some jurisdictions of the United States of America where adherence to the doctrine of the proper law is growing, but not yet universal.

[3] These words in Goethe's *Faust* are incapable of translation. The most satisfactory translation reads:

> What from your fathers' heritage is lent,
> Earn it anew, to really possess it.

It must be admitted that the subjective theory is the product of an age which proclaimed and adhered to the liberal maxim of the freedom of contract—an idea and, certainly, an ideal which for many has lost its attraction. The situation in which the State plans and prescribes, but the individual is allowed to contract out of what has been laid down for him, involves a paradox which does not readily lend itself to compromise, and from which those who prefer planning will escape by sacrificing freedom. These are usually subconscious and, perhaps, inarticulate reactions touching upon basic conceptions of policy, and therefore beyond the ambit of legal approach. But even the 'mere lawyer'[4] has recently on strictly legal grounds directed his critical powers to the principle of the proper law.

The most powerful attack was made by no less an authority than Dr. Cheshire who, ever since he devoted his attention to private international law, has shown some scepticism towards the prevailing practice,[5] and who has recently[6] restated and elaborated his view that the law governing contracts is not that intended by the parties, but that with which the contract has the most substantial connection. This objective theory and all its implications had hardly been put into shape when it was accepted by Denning L.J.[7] The learned Lord Justice's observations, it is true, were in the nature of an obiter dictum of the purest kind and, it seems, made without full argument on the point or complete investigation of the authorities, but their weight should not be underrated. Finally, in the sixth edition of Dicey's *Conflict of Laws*, Dr. Kahn-Freund, though he has not discarded one of the original author's great contributions to the subject, has drunk the cup of reform at least to such extent as to suggest that the question of the capacity of a contracting party should be governed by the law with which the contract is most substantially connected.[8]

It is in these circumstances that an unrepentant 'autonomist' feels provoked into trying to come to the defence of a principle which, he submits, deserves continued respect and support on account of its authority, justice and inherent soundness. That attempt, unfortunately, cannot be made without a measure of

4 Cheshire, *International Contracts* (Glasgow, 1948), p. 7.

5 See *Private International Law* (1st ed., 1935), pp. 183 *sqq.*; (3rd ed., 1947), pp. 311 *sqq.*, 325 *sqq.*; also Morris & Cheshire (1940) 56 L.Q.R. 335, and Falconbridge, *Conflict of Laws* (1947), p. 351.

6 See the lecture referred to in note 4. This publication is meant whenever reference will hereinafter be made to Dr. Cheshire.

7 *Boissevain* v. *Weil* [1949] 1 K.B. 482, 490, 491.

8 Pp. 619 *sqq.*; Dr. Cheshire, p. 51, at least admits that the law of the domicile applies, if the party is fully capable under it, but incapable by the law with which the contract is most substantially connected.

polemics, but their principal victim, so it may be pleaded in mitigation, has been good enough to say in advance that his forgiveness may be relied upon.

As will appear later, the defence will invoke a number of points of a technical and analytical nature. Weighty though they may be found to be, they would remain unsatisfying, unless they were supported by fundamental reasons, by arguments of principle. To these, therefore, pride of place must be accorded.

II

The kernel of the problem is indicated by two questions which are, and must be kept, distinct. Firstly, can it be sound law to allow the parties to decide, by choosing a particular legal system, whether or no they wish to be subject to a rule of *jus cogens* which may appear prima facie to apply to their contract? Secondly, if the answer to the first question is in the affirmative, can it be sound law to allow parties to choose any legal system for their contract, however remote the connection, however capricious the choice may be?

1. Until a few years ago the first question used to be put in a slightly different form. Anti-autonomists used to say that it was logically impossible to allow parties to choose the legal system applicable to their contract without first ascertaining the law permitting such choice. Such positivism could be refuted without difficulty: it is the private international law of the forum that allows controlling influence to the parties' selection. For that allegedly logical argument Dr. Cheshire has substituted plain, and considerably weightier, arguments of policy [9]: 'It is elementary common sense' that the applicability of rules of *jus cogens* 'must be decided independently of the expressed intention of the parties, or, to put it in another way, that the law by which they are to be governed cannot be a matter of free will. . . . It is idle to maintain that a court can be deprived at the caprice of the parties of control over a contractual question which it regards as subject to its authority'. It would be 'puerile even to suggest to any court in any country' that an English contract, void for want of consideration, should become enforceable by a contractual clause to the effect that it shall be binding notwithstanding the absence of consideration. Had the parties submitted their contract to Scottish law,

> this cannot be a more effective means than the first device of conferring validity upon the English contract. The parties have attempted indirectly, instead of directly, to avoid the compulsory rule.

[9] Pp. 19, 20.

These observations lose their force when it is realised that Dr. Cheshire himself is inevitably driven to the very conclusion which he condemns, and in fact allows, and must allow, the parties to do by a little more indirect route what, according to him, they cannot do directly; he allows the parties to determine the localising elements on the basis of which the judge is supposed to ascertain the contract's centre of gravity. These localising elements [10]

> may be numerous and diverse, and it is the country in which they are most densely grouped that constitutes the centre of the contract and furnishes the governing law. In one sense, therefore, the proper law is ascertained regardless of what the parties might have preferred. But in another sense their intention is the crucial factor, for it is they themselves who have chosen the elements upon which alone localisation turns. The selection of a governing law is one of those elements. In this sense, and in this sense only, is it true to say that the proper law is the law intended by the parties. To say that the parties are free to choose the localising elements is not the same as saying that they are free to choose the proper law. If the latter assumption were true, they might choose the law of a country with which the contract is totally unconnected.

It follows that, according to Dr. Cheshire himself, the result in his hypothetical case referred to above would be different, if the parties had not merely submitted their contract to Scottish law, but had also made it most substantially connected with Scotland, *e.g.*, by concluding it in Scotland [11] (even if only by agents specifically appointed for the purpose) and by providing for performance in Scotland, such as payment to the Scottish branch of an English bank, or merely by providing for the jurisdiction of the Scottish courts.[12]

Such reasoning, it is submitted, rewards the artful and penalises the innocent, but otherwise is of little practical effect. If the selection of Scottish law is due to no other reason than the wish to avoid the English rules as to consideration (a result readily obtainable by the execution of a deed) and if such selection could not be made except by virtue of some elements connecting the contract with Scotland, it will not be difficult to create them. The suggested principle, therefore, would involve a minor obstacle and a detour, but would not eleminate the vice it is meant to destroy. It would merely transpose the controlling influence of the parties' will, and

[10] Pp. 27, 28.
[11] In Dr. Cheshire's view this in itself is not sufficient, although otherwise he attributes far-reaching effects to the place of contracting (pp. 56, 59): p. 20.
[12] See below, note 35.

thus the problem as a whole, to a different sphere. So long as the parties are allowed to choose the localising elements, and they must be allowed to do so, they at least indirectly choose the legal system, and no answer is given to the question why they should not be permitted to do so directly. Furthermore, it is implied in the foregoing, and will be elaborated below, that by its very objectivity in regard to the choice-of-law problem, and by its unlimited subjectivism in regard to the choice of localising elements, the objective theory in truth misses the vital result which it desires to achieve.

2. This leads to the second of the questions from which this discussion started—should parties be able to select any legal system they may fancy?

No less than ten times in the course of ninety pages Dr. Cheshire emphasises his horror at a theory which would allow the parties to 'choose any law in the world, even one with which the contract has no factual connection whatever'. This is, indeed, the crux of his argument, the *leitmotif* of his attack: no law 'entirely unrelated to the contract may capriciously be chosen', the selected law may not be one with which 'the contract is totally unconnected'.[13]

It is a fact of outstanding significance that there does not seem to be a single case either in this country or abroad where parties have made a clearly capricious choice. There is therefore no reason to quarrel with the essence, as opposed to the implications, of Dr. Cheshire's fifth proposition,[14] according to which, 'where the law expressly chosen by the parties has been accepted by the courts as the proper law to govern the substance of the obligation, there has always been some factual connection between the contract and the country of the chosen law'. Indeed, parties usually are reasonable people, and it is exceptional that a contract made by a freak or a crank or a fraud falls to be considered by the courts. This absence of evidence may explain, though perhaps not excuse, the fact that, in the formulation of the subjective test, the problem which Dr. Cheshire stresses and which, it must be admitted, is at least in theory a real one, was frequently ignored and certainly neglected, with the result that the subjective test was (wrongly, it is believed) alleged to facilitate evasion of law.

However, a considerable amount of guidance was given by the case which, for a number of years, has attracted the objectivists' wrath, namely, *Vita Food Products* v. *Unus Shipping Co.*,[15] where the parties had submitted their contract to English law, and where the Privy Council gave effect to that submission, although

[13] Pp. 16, 18, 24, 28, 29, 40, 41, 43, 64, 80.
[14] P. 33.
[15] [1939] A.C. 277.

in Dr. Cheshire's view it was capricious. The facts were as follows. Bills of lading were issued in Newfoundland by the respondents, a company incorporated in Nova Scotia, to the appellants, a company incorporated in New York. They provided for the carriage of goods from Newfoundland to New York. By accident, the respondents used old forms which were not intended for use outside Newfoundland and did not include the Hague Rules or the statement, prescribed by the law of Newfoundland, that they were to have effect subject to the provisions of those rules. They did contain a clause according to which the contract was subject to English law. An exceptionally strong Board (Lords Atkin, Russell of Killowen, Macmillan, Wright and Porter) held that, as stipulated in the bills of lading, English law applied.

In order to ascertain the essential point of the decision it is necessary to eliminate one matter which has given rise to comment, but should not influence judgment on the decision's theory of the proper law. The fact that the particular forms were used inadvertently, is, surely, an irrelevant circumstance which should be disregarded. In the absence of mutual mistake parties are bound by what they have signed. There is, therefore, no justification for the complaint [16] that the Judicial Committee 'gave effect to what the parties did not intend'. As Lord Dunedin said, in a case to which Dr. Cheshire refers in another connection, 'commercial contracts cannot be arranged by what parties think in their inmost minds. Commercial contracts are made according to what people say'.[17]

Giving effect to the parties' selection of English law, Lord Wright, who delivered the Privy Council's opinion, said: 'Connection with English law is not, as a matter of principle, essential. . . . In any case parties may reasonably desire that the familiar principles of English law should apply'.[18] Dealing with the general rule of the conflict of laws, he held that the parties' express statement of their intention to select the law of the contract was decisive, 'provided the intention is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy'.[19]

It is submitted that in these words there must be found the only qualification of the test of intention that is both possible in the present state of the authorities and sound in theory. It must be

[16] Cheshire, p. 32. The much-discussed question whether the construction put by the Privy Council upon the Hague Rules deserves support, lies entirely outside the ambit of this paper.
[17] *Muirhead & Turnbull* v. *Dickson*, 1905, 7 F. 686, mentioned by Cheshire, p. 57.
[18] At pp. 290, 291.
[19] At p. 290.

conceded that the juxtaposition of '*bona fide* and legal' is, perhaps, not a very happy or precise turn of the phrase. It might have been preferable, if Lord Wright had spoken of the requirement of a genuine intention. Others may require the selection to be free from fraud or, to adopt a well-known test, to be reasonable. Again, it may be suggested that the parties' choice should be limited to one of those legal systems with which the contract has some contact [20] or a substantial (as opposed to the most substantial) connection. Or it may be said that the parties must choose one of those laws which the court could [21] have found to be the proper law had there been no express choice. But these various tests do not really differ in substance. One must avoid mere play with words, or an interpretation of judges' dicta which is purely verbal and thus opposed to the spirit of the common law. Whatever formulation is employed, the evil which, it is believed, Lord Wright had in mind, and which all the tests are aiming at, belongs to that category which has always proved inaccessible to exact mathematical definition, yet has invariably been discovered by the courts. When a lease was executed merely for the purpose of creating a standard rent, but without any real intention to grant an estate, the court had no difficulty in finding that it did not constitute a tenancy within the meaning of the Rent Restriction Acts.[22] Similarly, if a contract which is wholly French and which is known to the parties as being really French, is made subject to the law of Japan and there are no good reasons for the selection of Japanese law, the court may find that that selection was not real, genuine, bona fide, legal or reasonable. There will be borderline cases in which the decision cannot be predicted, and great merit attaches to efforts to improve the formula, to define the elements to be taken into account, to delimit the circumstances in which a case falls on the right or on the wrong side of the line.[23] These details, important though they are, are beyond the scope of the present discussion. It must suffice to emphasise that in the crucial case courts may be expected to be able to distinguish the genuinely intended selection from a mere device which is put down on paper, but lacks reality.

On this basis some conclusions emerge which justify a few comments.

[20] This suggestion was made by Dr. Martin Wolff in a recent lecture given to the Grotius Society on 'Some Observations on the Autonomy of Contracting Parties in the Conflict of Laws', which will soon be published in the Society's *Transactions*, and will hereinafter be referred to as Wolff, *Observations*.

[21] Not: would.

[22] *Conqueror Property Trust, Ltd.* v. *Barnes Corporation* [1944] K.B. 96.

[23] Such efforts have notably been made by Dr. Martin Wolff, *Private International Law*, p. 427, and his *Observations*.

In the first place, it is evident that the parties' choice of English law in *Vita Food Products* v. *Unus Shipping Co.*,[24] cannot be said to have been capricious. It will be shown below that the choice of English law cannot, in the eyes of an English court, or even a Nova Scotia court, ever be objectionable.[25] Even apart from this general consideration, where bills of lading are concerned which are connected with the laws of Newfoundland, Nova Scotia or New York, it must be open to the parties to make the familiar rules of English commercial law applicable. If this were not so, shipping business, with all its incidental transactions such as bankers' credit or insurance, would be gravely prejudiced all over the world. It would be absurd for English courts to deny this, seeing that even foreign courts have arrived at remarkable decisions recognising the pre-eminence of English law in matters of commercial and maritime law. Perhaps the most significant decision on this point is one of the Court of Appeal at Hamburg: English law was held to govern a charterparty made at Genoa between Italian shipowners and Russian charterers, and relating to a voyage of an Italian ship from the Black Sea to such European or North African port as might be designated by the charterers, in fact to Bremen. There was no connection whatever with English law, except that the charterparty was in the English language and obviously employed terms of English law and practice.[26]

Secondly, in so far as the objective theory of the proper law aims at excluding a capricious choice, it finds itself in harmony with the subjective theory.

Thirdly, however, in the pursuit of that aim the latter theory is more efficacious than the former. This leads back to a point which has already been alluded to. The objectivist has only one test at his disposal, *viz.*, the most substantial connection established by the free will of the parties. He ignores the circumstances in which the localising elements have been created. The subjective theory, by allowing the parties' motives to be investigated, has a wider ambit. It permits inquiry into the reasons which led to the agreed grouping of the localising elements. If this is not done, capriciousness in choosing these elements might be substituted for capriciousness in choosing the legal system. In the last resort it must be the innocence or the improbity of the parties' motives that matters. If the motive for selecting a legal system is innocent in the sense indicated above, the absence of substantial connection is irrelevant; if it is improper, the creation of howsoever many localising elements

[24] [1939] A.C. 277.
[25] Below, Section III, 4.
[26] February 13, 1934, *Rechtsprechung auf dem Gebiete des Internationale Privatrechts*, 1934, No. 38.

and, thereby, of substantial connection, will not make the selection valid. To allow the parties freely to choose the localising elements, yet to restrict them in their choice of law, is inconsistent. The choice of law and the choice of localising elements may be equally vicious. Neither can be struck at except by analysing the motives, that is to say, by a subjective approach.

III

No adherent of the objective theory can deny that the amount of support which it can derive from the authorities is meagre. In no case have the courts refused to give effect to the parties' express choice of law. On the contrary, in all reported cases and, no doubt, in innumerable unreported cases, the courts have accepted the parties' choice without questioning it, and if occasionally they have added a word of approval or justification,[27] this merely meant that they did not consider the choice unreasonable. In no case in which the parties had failed to determine the law, have the courts asked themselves with which legal system the contract was most closely connected : they have always seen their task in ascertaining the parties' implied intention.[28] Apart from Dr. Cheshire, Dr. Morris and Dean Falconbridge, no English writer [29] has propounded an objective theory of universal application. In particular it would, it is believed, be unjustified to read too much into the words of Westlake who, it is true, has since 1880 taught that the governing law should be selected ' on substantial considerations, the preference being given to the country with which the transaction has the most real connection, and not the law of the place of the contract as such '.[30] But Westlake was not concerned with cases of an express choice. As the context proves, he was concerned with automatic tests such as the *lex loci contractus*. He was trying to find a guide to the implied intentions of the parties, and he found it in a formula which, for this limited purpose, has met with a measure of approval, but which, in truth, does not have the far-reaching impact frequently attributed to it. For parties may be expected to have in view that legal system with which their contract has the

[27] Cheshire, p. 28.

[28] The latest decisions of the House of Lords are *Kahler* v. *Midland Bank, Ltd.* [1949] 2 All E.R. 621, and *Zivnostenska Banka National Corporation* v. *Frankman* [1949] 2 All E.R. 671. The question whether in the former case the majority of the House of Lords applied the subjective theory in a commendable manner, is open to considerable doubt. For present purposes it is sufficient to add that it is by no means certain whether the objective theory would have led to a happier solution.

[29] Nor is it altogether certain, as Dr. Wolff suggests in his *Observations*, that the objective view prevails in Continental literature. That it has no support in the practice of the courts, is common ground.

[30] 7th ed., p. 302.

most substantial or at least a substantial connection. In other words, where there is no express choice, there will normally be no practical difference between the test of the most real connection and the test of the implied intention, *i.e.*, the intention that can reasonably be inferred from the circumstances. This is a point of some significance, because it shows that the kernel of the objective theory lies in its attack on the possibility of an express choice or, perhaps, still more narrowly, of a capricious choice.

It is submitted that the prevailing practice should be sustained by scholars. It would seem that four major reasons of a technical character can be adduced in support of this proposition.

1. In those cases in which the parties have made an express choice, the subjective theory achieves one of the law's paramount purposes—it achieves certainty. The objective theory exposes the parties to the risk of being told *ex post facto* that what they have agreed upon, often after much bargaining, is abortive, and that their contract is subject to a legal system to which neither of them may have been prepared, or may have expected, to submit. As experience shows, the number of cases in which parties make an express choice is growing. Nothing should be done that could interfere with a tendency so apt to facilitate commerce.

The advantage of certainty is being abandoned by the objective theory in a manner which introduces a particularly dangerous type of uncertainty. This is due to its requirement of a 'most substantial connection', a definition involving degrees, estimates, evaluation in matters normally incapable of being measured or weighed. The straightforwardness of the suggested test is deceptive. How is one to say whether a contract is more or less substantially connected with a particular law? In the vast majority of cases the question is one of grade, shade, nuance, of fine distinctions and neat balancing, on which different minds may reach different conclusions. Take a very usual case: under a contract made in Brussels an English importer buys goods from a French exporter; the goods are to be delivered in London, payment is to be made in Paris; the purchase price is expressed in sterling, but payable in Paris at an agreed rate of exchange. Is this contract more substantially connected with France than with England? Are the parties who may have taken legal advice in Brussels and, acting upon it, agreed upon the control of Belgian law, to be told that the connection with Belgium is too remote to permit the enforcement of their agreement?

2. These difficulties are less grave where the parties have not made an express choice. In such cases in which, as has been pointed out, both the objective and the subjective theory will usually arrive

at the same result, the burden of the argument against the objective theory lies not in the uncertainty it creates, but in the difficulty of applying it.

The objective theory emphasises the objective elements of the contract and pushes the interpretation of the contract, the subjective test, into the background. Therefore, it expects of judges something that is not only unfamiliar, but also very difficult for them : instead of asking themselves what these particular parties intended to do, they have no other guide than what the parties have in fact done. For the purpose of construing the contract, of ascertaining the parties' intention, a wide range of circumstances may be taken into account by the judge who may also hear evidence on them; for the purpose of finding the most substantial connection the judge must confine himself to an investigation of such elements as have a localising effect. He cannot, therefore, consider an antecedent course of conduct or views expressed by the parties in the course of the negotiations, or the standardised character of a commercial contract or similar matters.[31]

These differences and difficulties are particularly clearly illustrated by the very case in which Denning L.J. expressed his approval of Dr. Cheshire's theory of the proper law, *i.e.*, *Boissevain* v. *Weil*.[32] The plaintiff, a Dutch subject, and the defendant, an Englishwoman, found themselves in 1944 in Monaco, cut off from their respective home countries. The defendant had run out of money and, of course, could not have anything sent from England. The plaintiff had money available. He lent a sum of francs to the defendant, who promised to repay it after the war in sterling out of her English banking account. The parties wrote, and probably spoke, in the English language. In the view of Denning L.J. this contract was most closely connected with England. With great respect, this seems open to considerable doubt. The parties were in Monaco and had to expect to remain there for some time. It was there that the defendant needed money. It was there that the plaintiff had money and lent it to the defendant. England was far away, not only in terms of miles, but also in terms of time; being completely surrounded by the enemy and in the then state of the war, the parties could not know when England would again become accessible to them. Repayment in England was a matter for the distant future. Payment in Monaco was a matter of immediate and the most real urgency. Monaco would

[31] Cf. *The Njegos* [1936] P. 90. The La Plata contract is an outstanding example of purely commercial connexity which may not be so close as to come within Dr. Cheshire's definition.

[32] [1949] 1 K.B. 482.

seem to have been the place with which the contract was most intimately connected.

If, however, the test of intention is applied, strong arguments can be used in support of Denning L.J.'s conclusion. Probably neither party knew anything of the law of Monaco, or had any wish to submit to it in its then or future state of development. Their familiarity with, and certainly their confidence in, English law must have been much greater. They used the English language. They knew that the defendant would return to England where she had her money and where she would become subject to the court's jurisdiction. It is therefore reasonable to assume that the parties had English law in mind.

3. It may be a short and small point in favour of the subjective theory, but to some it will be a weighty one, that the objective theory would introduce the doctrine of renvoi into the private international law of contracts. The subjective theory excludes renvoi by virtue of the fact that the parties may reasonably be assumed to have intended to refer to the domestic rules, not to the conflict of laws of their chosen legal system.[33] This line of reasoning does not appear to be open to the objective theory. A doctrine which Dr. Cheshire considers [34] as ' contrary to common sense ' and ' repugnant to the true nature of any system of private international law ', and which even in the eyes of its adherents should not be given an unnecessarily wide ambit, would control a field at present closed to it.

4. The objective theory leads to a certain incongruity which is not only dogmatically unattractive, but also inconvenient in practice.

It arises, firstly, from the concessions which objectivists are bound to make to the subjective theory. Thus Dr. Cheshire admits that, where parties have agreed to submit to arbitration or the courts in a particular country, and thereby decide upon the applicability of such country's law, effect must be given to this choice.[35] Another admission has not been, but ought to be made by him. In Anglo-Saxon as well as in Latin countries foreign law

[33] Dicey (-Morris-Kahn-Freund), 6th ed., p. 581.

[34] *Private International Law*, 2nd ed. (1938), p. 65. These actual words do not seem to be repeated in the third edition, but the author's views as expressed there are no less pronounced.

[35] Pp. 39 *sqq.* The argument (p. 43) that the chief evil of the subjective theory, *i.e.*, the choice of an entirely unrelated legal system, ' will to a great extent be avoided, if the institution of proceedings in the foreign country is a necessary prerequisite of the application of the foreign law ', is not convincing. It should also be remembered that, in the absence of treaty arrangements, an English court may, in the exercise of its discretion, allow an action to proceed and thus override a submission to arbitration or to the jurisdiction of a foreign court. Would Dr. Cheshire say that in such circumstances the selection of a foreign law becomes invalid?

is a question of fact not only in the sense that it has to be proved by the parties, but also in the sense that, unless it is pleaded, it cannot be applied by the court. English conflict rules, therefore, have to a large extent the character of subsidiary or optional law, the relevancy of which is subject to the will of the parties or one of them. Even where foreign law is pleaded, but not proved, it is presumed to be the same as English law. It follows that it would be inconsistent, if parties were restricted in their liberty to refer their contract to English law or, in other words, to do by contract what they can do by their pleadings. An agreement that a contract should be subject to English law, should, therefore, always be enforced.[36]

Another unevenness is created by the fact that the objective theory leads to a splitting up of the contract. This is a tendency which English law permits,[37] but at which it looks askance,[38] and which should not be promoted.[39] That such matters as capacity and formalities are separated from the substance of the obligation, is, of course, well established and, by the nature of things, inevitable. But to submit the facts of agreement (*e.g.*, offer and acceptance) and the reality of agreement (*e.g.*, mistake) to the *lex loci contractus*, yet to submit the interpretation of the agreement to the law intended by the parties, and all other matters to the law of the country with which the contract is most closely connected,[40] these are consequences which cannot be readily accepted. Not all of them, it is true, are necessarily inherent in the objective theory which could afford to extend the application of the law of the most substantial connection to those two matters which, somewhat surprisingly, Dr. Cheshire desires to submit to the *lex loci contractus*. But to put interpretation on a distinct footing involves more than a mere aesthetic defect. It may suffice to point out that frequently the discharge of the obligation, for instance, by frustration, cannot be separated from its interpretation.

However persuasive these objections to the objective theory may be found to be, they cannot, it is suggested with respect, carry the same weight as the chief arguments which militate against it and which can be summarised very shortly. To a large extent the controversy is purely verbal or 'essentially academic'.[41] Where

[36] In the same sense Wolff, *Observations*.
[37] Dicey (-Morris-Kahn-Freund), 6th ed., p. 581.
[38] *Kahler* v. *Midland Bank, Ltd.* [1949] 2 All E.R. 621, 633, *per* Lord MacDermott.
[39] M. Wolff, *Private International Law*, p. 480.
[40] Pp. 45 *sqq*.
[41] Nussbaum, *Principles of Private International Law* (1943), p. 161. This is particularly so in those cases in which there is no express choice and the subjective theory seeks to ascertain the implied or imputed intention of the parties.

practical differences of approach or result arise (*i.e.*, primarily in case of an express choice of law), any advantages to be derived from the objective theory are so slight, and its disadvantages are so substantial that, on balance, there is no justification for concentrating upon its establishment rather than upon the elaboration and refinement of the subjective theory.

F. A. MANN.[42]

[42] LL.D.(Lond.), Solicitor.

NOTES

Recent English Decisions on Private International Law

1. *Domicile*

Donaldson v. *Donaldson* [1] is an authoritative decision on the question whether a serving member of the armed forces can acquire a domicile of choice within a State or country in which he is serving under orders. The respondent, a Royal Air Force officer, was divorced by his first wife in Florida, where he was stationed on active service and where his wife had joined him. This wife later petitioned for divorce in England, alleging that the respondent had committed adultery with a woman with whom he had gone through a ceremony of marriage subsequent to the Florida decree. The respondent, by his answer, denied the adultery, contending that his marriage to the petitioner had been dissolved in Florida. It should be noted that the alleged acts of adultery all took place after the American decree had been pronounced. The only material question for the court was whether the respondent at the time of the Florida decree was domiciled in that State, so as to confer on its courts jurisdiction to pronounce a divorce which English courts would recognise. The respondent before his posting to Florida was domiciled in England, and was, of course, subject to recall or posting elsewhere. In fact, within a short time after the decree of divorce and his subsequent remarriage, he was posted back to England, where he had remained and been joined by his second wife.

Ormerod J. was satisfied that at the date of the Florida decree, the respondent had formed an intent to make his home in Florida. As the learned judge observed :

> ' The fact that his service duties would take him away from Florida for some considerable time—probably so long as he was serving—would not, as I see it, affect the matter so long as he was then living in Florida and had determined to continue to live there when he could '.[2]

The fact that the intent to make Florida his home had not been carried out, and the further fact that at a *later* date the intention of acquiring an immediate Florida domicile no longer existed, did not affect the learned judge's holding that *at the date of the decree*

[1] [1949] P. 363.
[2] At p. 365.

the necessary *animus* and *factum* for the acquisition of a domicile of choice in Florida were both present.

This case confirms the views propounded in the sixth edition of *Dicey*.[3] Earlier editions had squarely stated that ' a soldier or sailor in the service of his own sovereign retains the domicile which he had on entering the service wherever he may be stationed '.[4] The earlier view, which was the opinion of Dicey himself, was not without powerful support. Dicey's statement was cited with approval by Lindley J. in *Re Mitchell, ex p. Cunningham*.[5] A similar view was expressed by Pearson J. in *Re Macreight*.[6] In neither case was the dictum necessary for the decision. However, Dicey's rule was adversely criticised in the Scottish case of *Sellars* v. *Sellars*,[7] where the Court of Session unanimously held that it was too broadly expressed. In the opinion of the Scottish court, provided that to residence imposed by orders, there were added ' facts and circumstances which establish a residence voluntary in character and chosen by the soldier although it is a residence in the place where he is stationed by the orders of his military superiors ',[8] a domicile of choice could be established. Presumably, what was meant was that the residence must be accompanied by the appropriate *animus* to establish its voluntary character. On the facts in *Sellars* v. *Sellars*, it was held that the pursuer had failed to show that he had acquired the domicile of choice he claimed in Scotland, so that his residence in that country under orders was not sufficient to establish a domicile there.

With respect, it is submitted that the view of Ormerod J. is correct and wholly desirable. English doctrines relating to domicile are already somewhat unrealistic, and if domicile is to maintain any close relationship to the notion of *home*, it is necessary that attention be paid to the factor of *animus*, provided, of course, that this is accompanied by the fact of residence. To insist that a man, serving under obligation in a particular place, who can satisfy the court that it is in that place that he wishes to make his permanent home, nevertheless cannot acquire a domicile there, simply because he is under orders which may take him elsewhere, seems wholly unrealistic. Such insistence ignores the underlying purpose in resorting to the concept of domicile. It may be, of course, that a heavy onus lies upon a person stationed under orders in a particular place to satisfy the court that he has the requisite *animus* for the

[3] Dicey, *Conflict of Laws* (6th ed.), p. 124.
[4] See 5th ed., p. 131.
[5] (1884) 13 Q.B.D. 418, 425.
[6] (1885) 30 Ch.D. 165, 168.
[7] 1942 S.C. 206.
[8] At p. 211, *per* Lord Normand.

acquisition of a domicile there,[9] but that is very different from an insistence that a domicile of choice cannot be acquired in these circumstances.

It is very interesting to note, however, that some American authorities, whose views on domicile are in general rather more liberal than the English doctrines,[10] take up a rather surprising position in this case. *The Restatement of the Conflict of Laws*[11] affirming here, as in many other places, the views of the late Professor Beale,[12] propounds the following rule. A soldier or sailor, if he is ordered to a station where he must live in quarters assigned to him, cannot acquire a domicile of choice there, though he lives in the assigned quarters with his family. The reason is, that he must obey orders and cannot choose to go elsewhere. If, however, he is allowed to live with his family where he pleases, provided it is near enough to the post to enable him to perform his duty, he can acquire a domicile in the place where he lives. Beale supports the distinction, saying that ' one cannot choose a place as a home if one's presence is compelled by law '.[13] With respect, one may ask—why not? What is the peculiar significance of the distinction between residence on the post and at a place near enough to the post to enable the man to reach his place of duty? On Ormerod J.'s approach to the problem, which it is submitted is the correct one, the difference is not important. In each case, granted the *factum* of residence at or near the place of duty, the decisive question must be the *animus*. Otherwise, we are driven by mechanical reasoning to ascribe a legal home, *i.e.*, a domicile, to a man, which simply does not accord with the facts.

It should be noted, however, that there is judicial support for the Restatement–Beale view : see the Iowa case of *Harris* v. *Harris*.[14] However, the more recent decision of *Burgan* v. *Burgan*,[15] decided in the Supreme Court of Louisiana, suggests rather the approach of Ormerod J. in *Donaldson* v. *Donaldson*.

2. *Application for Injunction to Restrain Proceedings in a Foreign Court*

In *Orr-Lewis* v. *Orr-Lewis*,[16] a wife had petitioned for divorce in an English court. The husband contended that the court lacked

[9] Dicey, *op. cit.* (6th ed.), p. 124.
[10] Willis, 14 Can.Bar.Review, pp. 4, *et seq.*
[11] Sec. 21 (*c*).
[12] *Conflict of Laws*, Vol. 1, pp. 154 *et seq.*
[13] *Op. cit.*, p. 156.
[14] (1927) 205 Iowa 108.
[15] (1945) 207 La. 1057.
[16] [1949] P. 347.

jurisdiction to entertain the petition, alleging that he was domiciled in France. Willmer J. and the Court of Appeal rejected the plea, holding that the husband was domiciled in England. The husband instituted divorce proceedings in France, and the wife sought an injunction to restrain the husband from proceeding with this French suit until such time as her English petition had been heard. There was no evidence before the court that any date had been set down for trial of the French action.

Willmer J. refused to grant the injunction. While such a jurisdiction existed to stay a party from proceeding with a foreign action, the court should be slow to exercise it in view of Scrutton L.J.'s statement in *Cohen* v. *Rothfield*,[17] that

> ' as the effect is to interfere with proceedings in another jurisdiction, this power should be exercised with great caution to avoid even the appearance of undue interference with another court '.

The learned judge also referred to the distinction made by Scrutton L.J. in *Cohen* v. *Rothfield* between cases in which the same person was plaintiff in both actions, and cases where one party was plaintiff in one place and the other defendant in the second country. In the latter situation, the arguments against granting the injunction were even stronger. As Scrutton L.J. put it [18] :

> ' Where the plaintiff in the foreign action is not plaintiff but defendant in the English action, the case against interference is even stronger, for the person to be stayed has not himself initiated two proceedings. He has initiated one, and has been compelled to appear in another over which he has, as defendant, no control.'

Only one reported case of this type has been discovered in which an injunction had been granted. This was the old case of *Bushby* v. *Munday, Cloves & Cracroft*.[19] There the defendant brought an action against the plaintiff in Scotland to enforce payment of a bond governed by English law. The plaintiff brought an action against defendant in England for the purpose of having the bond delivered up to be cancelled. Leach V.-C. granted an injunction restraining the Scottish proceeding. He observed that a decision in favour of the plaintiff in Scotland would not preclude further proceedings in England. On the other hand, the English proceedings (for cancellation) would put an end to the matter. The learned Vice-Chancellor further stressed the superior powers of discovery available in the English court.

[17] [1919] 1 K.B. 410, 413.
[18] At p. 414.
[19] (1821) 5 Madd. 297.

In the instant case, Willmer J., following earlier authority, concluded that this jurisdiction

> ' is one which I am not to exercise except with great caution on being satisfied that the continued prosecution of the French suit would in the circumstances, be oppressive or vexatious, and, I should add, would cause serious if not irreparable damage to the petitioner '.[20]

Applying this test the injunction should not be granted. The proper course for the wife to have taken was to have set down her petition for hearing immediately the Court of Appeal had dismissed the husband's appeal. In any event, there was no evidence of immediate or foreseeable action in the French proceedings, and if the wife's petition were set down now, it was possible that the case might be disposed of before the French hearing.

It is respectfully submitted that Willmer J.'s decision is in accord with the authorities and clearly correct. This question is discussed in Dicey, *Conflict of Laws* (6th ed.), pp. 316 *et seq.*; Cheshire, *Private International Law* (3rd ed.), pp. 160 *et seq.*

Zelman Cowen.

Immunity of Foreign Sovereigns from Jurisdiction—Two Recent Decisions

Neither the decision of the Court of Appeal (Tucker, Cohen and Singleton L.JJ.) in *Krajina* v. *The Tass Agency and Another*,[1] nor that of Jenkins J. in *Dollfus Mieg et Compagnie S.A.* v. *Bank of England*[2] lays down any startlingly new principle of law. Both decisions are however interesting, as providing further illustration of the truth of the statement that ' British and American courts have rigidly adhered to the principle of jurisdictional immunity and have declined to modify it either by distinguishing between activities of the State in the field of private law and activities *jure imperii*, or by readily implying waiver of immunity '.[3]

In the *Tass Agency Case* the plaintiff brought an action in respect of an alleged libel contained in *The Soviet Monitor*, which had been published in England by the defendants. The defendants claimed immunity from jurisdiction on the ground that the Tass Agency is a department of the Soviet State.

It was shown that in June, 1938, particulars were filed under the Registration of Business Names Act, 1916, by the second

[20] [1949] P. 349.
[1] [1949] 2 All E.R. 274.
[2] [1949] 2 K.B. 369.
[3] Oppenheim, *International Law* (7th ed.), Vol. I, p. 242.

defendant (who was not a party to the appeal proceedings) : the business was described as a telegraphic news agency and in the particulars it was stated, 'the business name and address of the foreign firm as agent for whom the business is carried on : Tass Agency, Moscow, U.S.S.R.'. On July 2, 1948, after the issue of the writ, further particulars were filed which showed that the second defendant had ceased to carry on the agency in August, 1946. In these particulars it was not stated that the agency was being carried on as the agent for a Russian firm.

The Russian statute establishing the Tass Agency provides as follows :

Clause 1. 'The telegraphic agency of the Union of Soviet Socialist Republics (TASS) is the central information organ of the U.S.S.R., and is attached to the Soviet of People's Commissars of the U.S.S.R.'

Clause 15. 'The telegraphic agency of the U.S.S.R. and the telegraphic agencies of the Union Republics enjoy all the rights of a juridical person.'

The Soviet Ambassador to Great Britain certified that the Tass Agency 'constitutes a department of the Soviet State, *i.e.*, the Union of Soviet Socialist Republics, exercising the rights of a legal entity'.

Birkett J., relying mainly on the earlier Court of Appeal decision in *Compania Mercantil Argentina* v. *United States Shipping Board*,[4] confirmed the order of the master setting aside the writ against the first defendant. The Court of Appeal unanimously affirmed this decision. The Ambassador's certificate left no doubt that the Tass Agency is a department of the Soviet State. Cohen L.J., however, pointed out [5] that the instant case was not on all fours with the earlier decision relied upon by Birkett J., because 'in that case there was no evidence on which an argument could be based that the United States Shipping Board was a legal entity in any sense of that term. At any rate, if there was any such evidence, it is plain that it was not accepted by the court'. Counsel for the appellant in the instant case argued that, reading the statute creating the Tass Agency as a whole, the effect is that not only has Tass the rights of a legal entity, but also *is* a legal entity ; further, that if this is so, since Tass has a separate juridical existence from the U.S.S.R. it is not entitled to the immunity afforded to the U.S.S.R. It was in elaboration of this point that counsel argued that the evidence before the court as to the status of the Tass Agency was ambiguous

[4] (1924) 93 L.J.K.B. 816; 131 L.T. 388.
[5] [1949] 2 All E.R. 274, 276.

and self-contradictory, and that, as the onus of establishing their immunity rests on the defendants, the plaintiff's action should proceed. The court, however, held that as the evidence clearly showed that the defendant was a department of the Soviet State, a prima facie case for immunity had been made out. The onus was on the plaintiff to prove that the defendant was a separate legal entity. The juridical nature of Tass must, however, be determined by Russian law. The evidence of particulars filed under the Registration of Business Names Act, 1916, is therefore without significance. In fact, as Singleton L.J. points out: 'We are without any evidence as to Soviet law, except for (a) a translation of the statute concerning the Telegraphic Agency of the Union of Soviet Socialist Republics, and (b) a certificate of the Ambassador'.[6] It is not therefore surprising that Tucker L.J. emphasises that our decision in the present case 'can only be binding between the immediate parties thereto, and it may be possible that in some further proceedings . . . evidence may be forthcoming which may or might conceivably lead a court to come to a different conclusion'.[7] Nor is it surprising that the plaintiff failed to satisfy the onus of showing that the defendant agency constituted a legal personality distinct from the Soviet State, when regard is had to the following facts: (a) that there was no evidence before the court as to what Soviet law lays down as the prerequisites of a juridical entity; (b) that neither the statute nor the Ambassador's statement suggested that the obligations, as distinct from, and in addition to, the rights, of a juridical entity were imposed upon the Tass Agency; (c) that the statute and Ambassador's certificate did not state that the agency *was* a juridical person, but merely that it enjoyed the rights of a juridical person (which wording was, on the interpretation most favourable to the plaintiff, ambiguous, and might on a less favourable interpretation even imply by antithesis that the agency was not a juridical person but *only* exercised the rights of one); (d) that the fact that certain British Government departments may be regarded by English law as corporations for certain purposes, is hardly relevant when considering whether this particular department of the Soviet Government is or is not regarded by Soviet law as a corporation for this particular purpose.

Perhaps the most interesting aspect of the case is implicit in an obiter suggestion. Counsel for the plaintiff argued that even if his contention that the Tass Agency was a separate legal entity failed, and even if (as was inevitable) it was not disputed that the agency

[6] At p. 285.
[7] At pp. 282–283. See, too, Singleton L.J. at pp. 284–5.

was a department of the Soviet State, the nature of its activities was such as to deprive it of immunity. Cohen L.J. had no doubt that counsel was right in admitting that in view of the decision of the Court of Appeal in the *United States Shipping Board Case*, this plea must 'in this court at any rate' fail.[8] At the same time, however, the learned Lord Justice appears to view with favour the possibilities of the converse proposition. If the court had come to the conclusion that the evidence did establish that Tass was given the status of a separate juridical entity, 'it does not seem to me necessary', says Cohen L.J., 'to follow that it would thereby have been deprived of its immunity'.[9] Tucker L.J., while pointing out that the effect of incorporation in the instant case is a matter for Russian law, adds: 'It may be that under some foreign systems of law such a separate existence might be considered inconsistent (with immunity), but it is clear from our Acts of Parliament that we do not consider the fact that a government department may have a separate legal juristic existence as necessarily incompatible with it being a department of State for which immunity can be claimed'. Singleton L.J., however, inclines to the opposite view: 'So far as I can see, there is no precedent for extending immunity to a corporate body carrying on business in this country, and I should wish for further argument before deciding that it could be so extended'.[10] The learned Lord Justice then goes on to cite dicta in *The Porto Alexandre*,[11] which illustrate the misgivings with which the court there came to the conclusion that a ship owned by a sovereign State and earning freight as a commercial vessel was nevertheless protected by the privilege of immunity. It is difficult to disagree with Singleton L.J.'s suggesion that those misgivings have even greater substance today, and his hope that radical modification of the principle of immunity may be considered in the near future. It seems tolerably clear that in the formulation of this modification regard should be had primarily to the functions and habits of the body (be it a separate legal entity or not) for which immunity is claimed. If (and, of course, only if) the body is found to be a part of an independent sovereign State, immunity should prima facie arise. But the waiving of immunity should be easily, and perhaps irrebuttably, presumed in litigation arising out of the department's activities of a clearly non-governmental nature. The determination of what constitutes such activities would give rise to difficulties in some cases. Such difficulties would not be happily resolved in

[8] At p. 278.
[9] At p. 280.
[10] At p. 285.
[11] [1920] P. 30, Hill J. summarised at p. 31; Bankes L.J. at p. 34; Scrutton L.J. at pp. 36 and 38.

accordance with any over-precise a priori principles, but rather on the facts of each particular case. To take two concrete examples : in the *Tass Agency Case* it might perhaps be argued with success that the function of this agency being to explain and promote understanding of the policy of the Government of the U.S.S.R., it was not so ungovernmental in character as to justify the presumption that immunity is waived; in the *Porto Alexandre Case*, however, where Hill J. was prepared to find, if it had been necessary, that the Porto Alexandre was being used in ordinary commerce, and that the only interest of the Portuguese Government was in the earning of freight, it might be difficult to come to a similar conclusion.

In the event of waiver of immunity being presumed in the circumstances suggested, it would still be arguable that a finding that the Tass Agency was a separate legal entity should not, in itself, have led automatically to the conclusion that immunity had been waived; and on this narrow ground one may respectfully agree with the dicta of Cohen and Tucker L.JJ. The presumption of waiver would, however, operate without regard to, and involve the rejection of, the converse principle that the finding that the Tass Agency was not a separate legal entity precluded any possibility of waiver, a principle resting on authority which the Court of Appeal found itself bound to follow in the instant case. A finding that a body claiming immunity was or was not a separate legal entity, would at most constitute simply *one* of the factors to be taken into consideration when determining the governmental or non-governmental character of its functions, or more specifically of the particular function, the exercise of which gave rise to the litigation.

In *Dollfuss Mieg et Compagnie S.A.* v. *Bank of England*, a French company commenced an action against the Bank of England claiming delivery up to them of sixty-four numbered gold bars, an injunction restraining the Bank from parting with possession of them otherwise than as directed by the plaintiff company, and (alternatively) damages. The bars in question had been looted in 1944 from a French bank which was then holding them on behalf of the plaintiff company. After the invasion of Germany the bars had been recovered by the United States forces, and had subsequently been deposited in the Bank of England pending ultimate disposal. This deposit was made under the orders either of the Tripartite Commission for the Restitution of Monetary Gold, or of the three constituent governments (France, United Kingdom and United States).

The defendants, the Bank of England, sought to set aside the writ and all subsequent proceedings in the action, on the ground that the bars of gold were in the possession of the three governments,

and that the action impleaded two foreign sovereign States which declined to submit to the jurisdiction of the court. Jenkins J. found for the Bank on this motion.

The learned judge makes (inter alia) the following points regarding the scope of the doctrine of immunity :—

(1) The speeches in the House of Lords in *Compania Naviera Vascongada* v. *S.S. Cristina*[12] indicate that the immunity from jurisdiction of a sovereign State's property extends to property which is merely in its possession or under its control. In cases where the foreign State has no proprietary interest in the property in question, possession or control, although essential, is also sufficient, to permit the principle of immunity to apply.

(2) ' . . . I do not think it can be maintained that the principle of immunity is confined to cases where either a foreign sovereign is directly impleaded as a defendant, or relief in rem is sought in his absence against property owned by him or in his possession or control '.[13] In other words, the contention that, in those cases where the person claiming immunity is not himself impleaded, the principle does not extend to proceedings in personam, is rejected. To hold otherwise, would often involve forcing the sovereign either to surrender his property or to submit to the jurisdiction as plaintiff in another action. As Brett L.J. said in *The Parlement Belge* in another context : ' To implead an independent sovereign in such a way is to call upon him to sacrifice his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests '.[14]

Applying these principles to the facts before him, Jenkins J. held :

(1) For the purposes of the principle of immunity, the gold bars, notwithstanding their deposit with the bank, were in the possession or control of the governments of the United Kingdom, France and the United States. Counsel had submitted (a) that the Government of the United Kingdom, as the sole bailor, was sole possessor of the gold bars; and alternatively, (b) that possession was vested in the bank as bailee. Jenkins J. rejected the former submission on the ground that notwithstanding the fact that there was evidence that the account had been opened ' in the name of His Majesty's Treasury on account of the Governments of the United States, the United Kingdom and France . . .', the real position of the United Kingdom Government was that of an intermediary acting on behalf of the three governments. Counsel's second submission was rejected

[12] [1938] A.C. 485.
[13] [1949] 1 Ch., *per* Jenkins J. at p. 384.
[14] (1880) 5 P.D. 197 at p. 219.

on grounds which are, it is respectfully submitted, not altogether precise and not altogether unobjectionable. The learned judge relies heavily on a passage from the judgment (delivered by Mellish L.J.) of the Court of Appeal in *Ancona* v. *Rogers*, which he cites : ' It seems to us that goods which have been delivered to a bailee to keep for a bailor, such as a gentleman's plate delivered to his banker, or his furniture warehoused at the pantechnicon, would in a popular sense as well as in a legal sense be said to be still in his possession, and we see no valid ground for holding that they are not still in his possession within the meaning of the Bills of Sale Act '.[15] Two observations are perhaps pertinent. First, in *Ancona* v. *Rogers*, the court had found as a fact that there had been no bailment by the grantor of a bill of sale to a third party. Mellish L.J. then makes the point that ' these observations are sufficient to dispose of the case '. All that follows (including the passage upon which Jenkins J. relied), the learned Lord Justice expressly gears to the hypothesis that the facts were otherwise than as the court had found them to be (*i.e.*, to the hypothesis that there had been a bailment to a third party). This being so, it is difficult to agree with Jenkins J.'s view that the passage upon which he relies is not merely obiter, but an alternative ground for the decision in *Ancona* v. *Rogers*. Secondly, it is submitted that Jenkins J. places an unnecessarily wide interpretation on the meaning of the dicta. A narrower interpretation is suggested by reading the excerpt cited, in conjunction with the sentence which immediately follows it in Mellish L.J.'s judgment : ' As long as the person who has parted with goods by a secret bill of sale is having the goods kept for him and is exercising dominion over them, the case seems within the mischief against which the Act is directed '. In other words might not the meaning of the dicta be (although unnecessarily wide reference is made earlier to possession generally) simply that on the facts visualised (*i.e.*, that a bailment had taken place) the bailor was still possessor *for the purposes of the Bills of Sale Act*, 1854 : or to put the matter in a way less likely to produce confusion or unduly wide interpretation, the bailor might still be a person who was in the words of the preamble to that Act, ' *keeping up the appearance* of being in good circumstances and possessed of the property '.

In the *Dollfuss Case*, Jenkins J. suggests (i) that the bailors (the three governments) not the bailee (the bank) had possession (using that term in its normal legal meaning) ; (ii) that at all events as

[15] (1876) 1 Ex.D. 285, at p. 292.

the limits of a principle such as that of the immunity of sovereign States cannot, 'based as it is on substantial reasons of policy', depend upon the niceties of the law of possession, there can be no doubt that the governments had possession for the purposes of the principle of immunity; (iii) that even if the bank and not the bailor governments had possession, the governments nevertheless had sufficient control over the gold bars to be able to invoke the principle in respect of them. The learned judge is apparently not shaken in his first contention by the fact that it might result in a so-called non-possessor (the bank) having a possessory lien (for bank charges) over the gold, against the so-called possessor. At the same time, in support of his second contention, he points out that to have too strict a regard for the rules of the law of possession might lead in certain circumstances to the applicability of the principle of immunity depending upon whether the property in question was in the hands of a servant of the sovereign or of an independent party such as a banker.

It is submitted with respect that the learned judge could, on the one hand, have avoided this gratuitous introduction into a branch of public international law of difficulties inherent in the English doctrine of possession, and that he would not, on the other hand, have been forced to utter dicta with somewhat startling implications in English private law, either if he had based his finding unequivocally on the narrow ground that whatever the position from the point of view of common law possession might be, the bank was 'possessor' for *the purposes of the principle of immunity*, or if he had made no mention of possession and had relied simply on the governments' control.

(2) Interference with the joint possession and control of the three governments would necessarily involve interference with the possession and control of each of them. (In other words, joint possession is analogous to joint tenancy rather than to tenancy in common.)

(3) It is doubtful whether it is necessary to show that the possession and control of the party claiming immunity are for public purposes. But on the facts of the instant case the possession and control of the three governments were manifestly for such purposes.

(4) The claim for damages is an indirect infringement of the principle of immunity. 'I think it would be a wholly unwarrantable restriction on the principle of immunity to hold that a foreign sovereign State in possession or control of property in this country cannot entrust such property to an agent for safe custody without

exposing the agent to the risk of being sued by third parties for wrongful possession . . .'.[16]

(5) The principle of immunity applies to the present case, and all further proceedings in the action must accordingly be stayed.

It can be seen that in this case, whenever he has been considering a particular limitation of the effects of immunity, and whenever he has been considering the applicability of the immunity to the facts before him, Jenkins J. has decided in favour of the wider interpretation. The decision in *Dollfuss Mieg et Compagnie S.A.* v. *Bank of England* therefore, indirectly but forcefully emphasises the need for a modification of the Anglo-American rigid adherence to the standpoint that immunity should be granted to a sovereign State regardless of the nature of the activities in respect of which it is claimed, and that waiver should not easily be implied. The wider the incidents of the immunity, the more circumspect we should be in granting it.

P. B. Carter.[17]

Recent Australian Decisions on Private International Law

1. *Domicile*

The outstanding merit of the domiciliary concept is its susceptibility to elastic application. This attribute has enabled the courts to adapt the legal criterion, in an almost imperceptible process of evolution, to changes of social behaviour, and has secured its vitality in the many law districts of the common law sphere where widely different standards of development and social trends demand expression. In respect of the latter aspect, the utilisation of a common legal concept has posed problems which have not found a uniform solution in all the law districts affected. The pressure of the newborn sociological philosophy of the American continent was reflected at an early time by distinct departures, in point of detail, from the English rules which had grown up around the domiciliary criterion. Thus, whereas Anglo-American theory is at one in subscribing to the rule that no person can abandon his domicile without acquiring a new one, the American differs from the English in its rejection of the revival doctrine of the domicile of origin. The American courts in this instance were undoubtedly influenced by the policy of facilitating the integration of immigrants into their own social organism, and of severing the relations of colonists with

[16] At p. 394.
[17] Fellow of Wadham College, Oxford.

their mother countries. Again, while according to the strict view evolved by English courts, an ' animus manendi ' is negatived if the propositus entertains the possibility of subsequently changing his permanent home, however remote that contingency may appear at the relevant moment. As long ago as 1813 Parker J. in *Putnam* v. *Johnson*[1] remarked that ' in this new and enterprising country it is doubtful whether one half of the young men . . . fix themselves in any town with the intention of always staying there. . . . Probably the meaning of Vattel is, that the habitation fixed in any place, without any *present* intention of removing therefrom, is the domicile '. Within the British Commonwealth, the courts have, for an obvious reason, been more hesitant to attempt such undisguised departures from the English interpretation of domicile, but the very flexibility of that criterion has facilitated its uncontested acclimatisation. The contrast between the American and English standpoints on the acquisition of the domicile of choice, which is primarily a difference in formulation and emphasis rather than in application to concrete facts, is to some extent due to the prevalence of inter-State conflicts in the United States. The peculiar conditions arising from a federal structure with independent law districts finds a parallel in Australia which was lucidly explained by Barry J. in the recent Victorian case of *Walton* v. *Walton*[2] : ' In the Australian community, where social ideas and customs are substantially the same throughout the continent, and where there is a common nationality and a common language, the same significance or importance cannot be ascribed to a person's conduct in moving from one State to another as when the question arises in connection with the action of a person moving to a community where, by reason of a difference of language and national traditions, institutions and usages, he takes on the character of a foreigner. The notion that the people of each State form a separate community is held much less firmly and generally than formerly, and changing political conceptions, deriving from domestic and international pressures, and operating coincidentally with improved transport and communication facilities, are contributing greatly to the weakening of the notion. There are, therefore, not the same obstacles in the way of drawing the inference of fact in this case than there would be if the question under investigation were whether an Australian had acquired a domicile in a country where he was regarded as an alien '.

This approach, which in substance follows a similar formulation by the Supreme Court of N.S.W. in *Tracy* v. *Tracy*,[3] must be

[1] 10 Mass. 488.
[2] [1948] V.L.R. 487, 489.
[3] (1939) 39 S.R. 447.

welcomed as a clear pronouncement of the settled practice of Australian courts in the solution of inter-State problems of domicile. In the instant case, the propositus, who had a Victorian domicile of origin, obtained employment in N.S.W. and resided, with a view to permanency, in Sydney from 1934 until his enlistment in 1941. After a considerable period of overseas service he was posted to Victoria and lived there under Army orders when he presented his petition for restitution of conjugal rights for which the internal law of that State makes no provision. It was held that he was entitled to a decree as having resided within the jurisdiction for one year and being domiciled in N.S.W. by reason of Part III of the Matrimonial Causes Act (Cth), 1945, which makes it obligatory for any State court to entertain proceedings in these circumstances in accordance with the law of the petitioner's domicile. The case inferentially also raised the question of the acquisition of a domicile of choice by a person subject to compulsory direction. On the present facts, there was ample evidence that the petitioner intended to return to N.S.W. at the end of his enlistment period, so that the more difficult problem did not call for consideration whether a soldier is capable of implementing an independent intention to reside permanently in the law district to which he has been posted under orders. It will have been noted that an affirmative solution recently commended itself to Ormerod J. in *Donaldson* v. *Donaldson*,[4] following upon the earlier consideration of the problem in *Re Bischoffsheim*,[5] where this point was argued at length [6] but did not ultimately fall for decision. Australian courts had previously reached an identical conclusion. Despite the evident—and we believe technically well-founded—reluctance by O'Bryan J. in the case of *Fitzgibbon-Lloyd*,[7] repeated decisions in more recent years [8] have eliminated all doubts of its correctness.

2. *Trusts*

Notwithstanding the relatively frequent occasions on which questions of the conflict of laws relating to the validity and administration of inter vivos trusts have been canvassed by American courts, no practice approaching uniformity seems as yet to have emerged in the United States, although Cavers, in a penetrating analysis published in 1930,[9] indicated and defended a tendency to discard a

[4] (1949) 65 T.L.R. 233.
[5] [1948] Ch. 79.
[6] This barely emerges from a perusal of the report, but the present writer enjoyed the benefit of being present at the hearing.
[7] [1944] V.L.R. 29.
[8] *Cox* v. *Cox* [1945] V.L.R. 105; *Pumpa* v. *Pumpa* [1946] V.L.R. 56.
[9] 44 Harv.L.R. 161.

priori selections of the law of the settlor's domicile or of the lex rei sitæ in favour of the more flexible approach of giving effect to the settlor's intention. In contrast, the paucity of English law is striking. The few decisions which have dealt with inter vivos trusts of property other than interests in land are primarily confined to marriage settlements, from which it does not inevitably follow that the principle invoked in those cases demands general application. Nevertheless, they strongly point to the conclusion that the courts are inclined to emphasise the contractual aspect of trust transactions in preference to assimilating them to property transfers. This tendency is opposed to the rule adopted by the American Restatement and the view tentatively expressed by Falconbridge who suggests that 'the creation and administration . . . should be governed by the law of the situs of the trust res, in accordance with the general rule that the creation and transfers of inter vivos interests (legal or equitable) in things of all kinds are governed by the lex rei sitæ, subject to whatever effect may by that law be given to the intention of the settlor '.[10]

But despite the incontrovertible justification for characterising trusts as property transfers, I would venture to suggest that this is no compelling reason for the adoption of the lex situs rule which, it must be remembered, is the appropriate connecting factor only for assignments of particular items of property. Trusts are apt to comprise a variety of property interests often located in different jurisdictions, and it would be prejudicial both to convenience and simplicity to make their validity and administration dependent on the law of the State or States in which each item is situate. This very consideration indubitably helped to prevent the universal applicability of the lex situs rule to such complex assignments of property as occur on death or on marriage. Since inter vivos trusts are substantially voluntary juridical acts, no conceivable argument could recommend the law of the settlor's domicile as such as the appropriate choice of law rule. There is, however, strong support for urging the adoption of the intention criterion without thereby implying an identification with commercial contracts. Choice of the same connecting factor does not, it is conceived, import a confusion in analysis between property and obligation.

The only English decision of any relevance appears to be *Re Pilkington's W.T.*,[11] where the question arose whether a deed of arrangement was formally valid which had been executed by a person resident in Scotland but domiciled in England without registration as required by the English Act of 1914. Farwell J.

[10] *Essays in the Conflict of Laws*, p. 561.
[11] [1937] 3 All E.R. 213.

considered that, in view of the Scottish legal terminology employed and a reference to a Scottish statute, it was ' perfectly plain, on the face of it, . . . that the law which was intended to be applied in dealing with this document is the law of Scotland '. Thus, not only did the settlor's domicile prove indecisive, but the fact that the property, in so far as relevant to the issue before the court, consisted of a trust fund subject to English law was inferentially deemed immaterial. In *Lindsay* v. *Miller*,[12] Lowe J. purported to follow that decision on an originating summons to determine the proper law governing (a) the construction, and (b) the validity of an ordinary inter vivos trust created by a domiciled Scotsman with an English residence. The other parties to the deed were three trustees of whom two, together with the settlor, executed the instrument in Scotland and the third in Victoria. The learned judge was of the opinion that both questions were concerned with the ' proper law of the trust ', which had to be ascertained by application of the principles laid down for commercial contracts by the High Court of Australia in *Mervin Pastoral Co.* v. *Moolpa Pastoral Co.*[13] In the absence of an expression of actual intention appearing by clear implication or necessary intendment, the presumed or constructive intention must be elicited from the nature and subject-matter of the transaction, its incidents and surrounding circumstances, situation of the parties and such other matters as must have been within their contemplation. In the evaluation of these various elements, Lowe J. observed that the preparation and execution of the document in Scotland was a mere matter of convenience and not a circumstance that the ' parties ' (settlor *and* trustees?) intended Scots law to be applied. Similarly, the use of Scottish terminology was but a natural consequence of the deed having been drawn up in that country. Although it was not strictly necessary to decide between the respective claims of the law of England and Victoria, by reason of the fact that the relevant trust dispositions offended only against Scots law, the decision went in favour of the latter alternative, despite the settlor's residence and clause 6 of the deed which provided for the destination of the property in a certain contingency according to the law of England. The significant factors supporting the choice of the law of Victoria were that the trust property consisted mainly of shares, none of which was Scottish but all Australian and mostly Victorian, that the trust deed was lodged in a bank at Melbourne and that all assets were held and the work of administration performed there. The reasons for judgment do not include a reference to the earlier statement that the beneficiaries

[12] [1949] V.L.R. 13.
[13] (1933) 48 C.L.R. 565.

were resident in England and Scotland. The decision is of considerable interest not only by reason of the variety of conflicting factors as determinative of the settlor's intention, but also because of the strong emphasis placed on the location of the trust res and the place of administration, and appears to lend little support to the suggestion prevalent in the United States that the various aspects of trust relations, as *e.g.*, validity, construction and administration, might be subjected to different connecting factors. Indeed, the submission of questions of administration to the lex situs or lex fori, which has been accepted in the law of succession [14] appears to be negatived for purposes of the law of trusts by the decision in *Re Hewitt's Settlement*,[15] where an application for the appointment of the Public Trustee as sole trustee of a Scottish marriage settlement was refused. It remains to add that the result of the instant decision corresponded to the principle 'ut res magis valeat quam pereat' which, though not mentioned in the judgment, is a by no means negligible factor in the objective ascertainment of intention.

J. G. FLEMING.

NOTES ON SOUTH AFRICAN PRIVATE INTERNATIONAL LAW

The Prohibition of Mixed Marriages Act, 1949,[1] *and South African Conflict of Laws*

In the Roman-Dutch law, the common law of South Africa, a marriage between persons of different race or colour was not on that account invalid.

In the Union of South Africa (there being no statute altering the common law) marriages between Europeans [2] and non-Europeans (which term includes Coloureds (persons of mixed race), Asiatics,[3] and Natives [4]) were celebrated in small numbers each year up to now in all the provinces except the Transvaal, where there was no machinery whereby such unions could be solemnised.[5]

The Union has now decided to follow the example set by over

[14] *Re Wilks* [1935] Ch. 645.
[15] [1915] 1 Ch. 228.
[1] Act No. 55 of 1949.
[2] A term with a peculiar meaning in South Africa. The Afrikaans term *blanke* (white person) is better.
[3] Which term does not include Jews or Syrians—they are always classified as Europeans (*i.e.*, Whites).
[4] African negroes.
[5] The *Marriage Ordinance Law*, No. 3 of 1871, applied only to white persons marrying each other (s. 25), and the *Marriage of Coloured Persons Law*, No. 3 of 1897, applied only to coloured persons marrying each other. In this context a coloured person was anyone not a white person.

half the States of the U.S.A., and to prohibit miscegenation. The *Prohibition of Mixed Marriages, Act*, 1949, states :

'1. (1) As from the date of commencement of this Act a marriage between a European and a non-European may not be solemnised, and any such marriage solemnised in contravention of the provisions of this section shall be void and of no effect : Provided that—

(*a*) any such marriage shall be deemed to be valid, if—

(i) it has been solemnised in good faith by a marriage officer, and neither of the parties concerned, or any other person in collusion with one or the other of them, has made any false statement relating to the said marriage amounting to a contravention of section *four*[6]; and

(ii) any party to such marriage professing to be a European or a non-European, as the case may be, is in appearance obviously what he professes to be, or is able to show, in the case of a party professing to be a European, that he habitually consorts with Europeans as a European, or in the case of a party professing to be a non-European, that he habitually consorts with non-Europeans as a non-European;

(*b*) where any such marriage has been solemnised in good faith by a marriage officer, any children born or conceived of such marriage before it has been declared by a competent court to be invalid, shall be deemed to be legitimate.

(2) If any male person who is domiciled in the Union enters into a marriage outside the Union which cannot be solemnised in the Union in terms of subsection (1), then such marriage shall be void and of no effect in the Union.'

This Act, ill-digested by the legislature, will be bound to give rise to some nice points in Conflict of Laws.

The Roman-Dutch rule was that in all cases the validity of a marriage was tested by the *lex loci celebrationis*. There was no problem of classification. All issues which other systems of law treat separately as those of formalities, capacity and (sometimes) substantial (intrinsic) validity, were dealt with on the same basis. This was the so-called *locus regit actum* principle of the Dutch

[6] Which states that any person who makes a false statement to a marriage officer, relating to the question whether any party seeking to have his marriage solemnised by such marriage officer is a European or a non-European, knowing such statement to be false, shall be guilty of an offence and liable to the penalties prescribed by law for the crime of perjury.

statutists, clearly set out in the works of U. Huber,[7] J. van den Sande,[8] J. Voet[9] and Bynkershoek.[10] A hundred years ago this principle of the civil law prevailed in England and the U.S.A.,[11] and although English law has departed from it as far as capacity to marry is concerned, it is still upheld by much authority in the U.S.A. There can be little doubt that—subject to exceptions—the *locus regit actum* doctrine prevails in modern South African law.[12] The exceptions may be classified as follows :

A South African court will not give effect to the *lex loci celebrationis* if :

(*a*) it would offend the distinctive public policy of South African law[13] (such as permitting the marriage of those closely related, or permitting a polygamous union[14]), or (possibly the following is merely an example of the foregoing) the precepts of the Christian religion[15];

(*b*) the parties have resorted to the *locus celebrationis* to evade some prohibitory or mandatory rule of the *lex domicilii* (on principle, of either party), and irrespective of whether such rule went to the form or the intrinsic validity of the marriage.[16]

If, however, the parties resort to the *locus celebrationis* not for the purpose of evading their domiciliary laws, and have the intention

[7] *De Conflictu Legum*, 8 (being *Praelectionum Juris Civilis*) (1690) 2.1.3.8; *Hedendaegsche Rechtsgeleerdheyt* (1686) 1.3.31.

[8] *Decisiones Frisicae* (1635) 2.1.1.

[9] *Commentarius ad Pandectas* (1704) 23.2.4.

[10] *Quaestionum Juris Privati* (1744), 2.26.2.; *Observationes Tumultuariae* (ed. Meijers *et al*), Nos. 71, 230, 348.

[11] Dicey, *Conflict of Laws*, 6th ed. (1949), pp. 759–760; Graveson, *Journal of Comparative Legislation*, 3rd series, Vol. 19 (1937), p. 21.

[12] Cf. *Ngqobela* v. *Sichele* (1893) 10 S.C. at 352–3 *per* De Villiers C.J.; *Seedat's Executors* v. *The Master* [1917] A.D. at 307 *per* Innes C.J.; *Friedman* v. *Friedman's Executors* (1922) 43 N.L.R. 259.

[13] Huber, *De Conflictu Legum*, 8; Burge, *Commentaries*, 1st ed., I, pp. 184 f., 199–200; Story, *Conflict of Laws*, ss. 113 f.

[14] *Masha Ebrahim* v. *Mahomed Essop* [1905] T.S. at 61; *Seedat's Executors* v. *The Master*, *supra*.

[15] Cf. Grotius, *De Jure Belli ac Pacis* (1604) 2.5.9–14.

[16] Huber, *De Conflictu*, 8 H.R. 1.3.31.; P. Voet, *De Statutis Eorumque Concursu* (1661) 9.2.9.; Brouwer, *De Jure Connuborium* (1665) 2.2.10.; J. Voet, 23.2.4.; Bynkershoek, *Obs. Tum.*, Nos. 91 and 1569, cf. 1121; Z. Huber, *Observationes Rerum Forensium* (1723), No. 1, pp. 8–9; van der Keessel, *Theses Selectae* (1800), No. 39; *Vervolg op de Hollandsche Consultatien* (1780–2), I, No. 32 at p. 136; Pothier, *Traite du Mariage*, Pt. 4, ch. 1, s. 363. *Contra* as regards form, but not as regards intrinsic validity, Sanchez, *De Sancta Matrimonii* (1669), 3.18.29, and Bar, *Private International Law* (Trans. Gillespie) (1883), p. 369. Rabel, *The Conflict of Laws*, I (1945), in stating (pp. 231–2) that almost all countries not prescribing a compulsory religious marriage recognise the rule that parties are free to choose any place to marry to avoid the formalities of their own countries, might well except South Africa. There are a number of authorities who expressly apply the *fraus legis* rule to formalities—Bynkershoek, *Obs. Tum.*, Nos. 91, 1569, Brouwer, *l.c.*; P. Voet, *l.c.*; J. Voet, *l.c.*, and *Vervolg op H.C.*, *l.c.*

of returning to the country of their domicile thereafter (if the pre-nuptial domiciles differ, then *semble* to the domicile of the husband), then it would appear that the marriage is valid in the view of the old authorities.[17] Thus by South African common law a marriage entered into with evasive intent is void. Why, then, section 1 (2) of the Act? There are two reasons:

Firstly, as shown in the recent case of *Estate Frankel* v. *The Master*,[18] South African courts are not loath to jettison a heavy weight of old authority in the Roman-Dutch law supporting a view which they feel is not, in the light of modern times and notions, a meritorious one; and, in deciding whether to follow the principles of the statutists or not, our courts are undoubtedly influenced by the development and principles of English law,[19] in which the evasive intent of the parties is irrelevant.[20] The matter of *fraus legis* in this connection has not yet come up for judicial decision in the Union, and it must be stated with every respect that with the courts in their present temper it is impossible to say with any confidence whether a rule of the Roman-Dutch writers dealing with a problem hitherto not before the courts will be followed or not.

Secondly, it will be noticed that section 1 (2) goes beyond the rule of the Dutch school. It does not matter that there was no evasive intent, that the parties after the marriage intended to set up their domicile (residence) in the country where the marriage was solemnised or some other country where such marriage would be valid—in South African law the marriage is void and of no effect. Difficulties have been experienced in certain states of the U.S.A. in proving an evasive intent[21] and the South African legislature, to quote a learned judge,[22] dealing with a long-since repealed evasion statute of the Orange Free State, 'did not discriminate between other systems and (colloquially put) they "took no chances"'.

Now it will be observed that section 1 (2) is in express words limited to a male person who at the time of his marriage outside the Union is domiciled inside the Union. It matters not that the female party is not domiciled in the Union, or even is domiciled in the *locus celebrationis*, nor that by the law of her country of domicile there is no prohibition of mixed marriages. What of the case where the female party's pre-nuptial domicile is in the Union, and the male's outside the Union, and one is a European and the

[17] Cf. P. Voet, 9.2.9.; Z. Huber, *l.c.*; Burge, 190–1.
[18] 1949 (1) P.H., B. 10 (N.P.D.).
[19] See, for instance, *Friedman* v. *Friedman's Executors*, *supra*.
[20] Cheshire, *Private International Law*, 3rd ed. (1947), p. 419; Rabel, pp. 231–2; Graveson, *op. cit.*, p. 26; Schmitthoff, *English Conflict of Laws*, 2nd ed. (1948), p. 307.
[21] Cf. Graveson, *op. cit.*, p. 25.
[22] De Villiers J.P. in *Von Abo* v. *Von Abo* [1927] O.P.D. 255, at 259.

other a non-European? The Act does not state that such marriage is void and of no effect in South Africa. Since, however, the object of the legislature was undoubtedly to prohibit miscegenation, it cannot be said that because the Act does not provide for this case such marriage will be valid, even though in fraud of law. There is a case where the *fraus legis* doctrine will have to be applied. In none of the examples given by the old authorities above-cited of marriages *in fraudem legis* was the female the only party domiciled in the country whose laws it was sought to evade. In all cases save one both parties were domiciled in such country; in the one exceptional case, the male party only. In principle, however, there seems no reason why the doctrine of evasion of the law should not equally apply where the party whose domiciliary law it is sought to evade is the female. The difference will lie, however, in the yielding nature of the common law as compared with the uncompromising statute. If it is the object of the parties not to return to and reside in the former country of domicile of the wife (*viz.*, the Union), then, it would appear, if the marriage is valid by the *lex loci celebrationis*, it will be upheld by a South African court.

Nor does the discriminatory nature of the *Prohibition of Mixed Marriages Act* stop at this. It is submitted that the statute is far harsher in its impact on a marriage contracted outside the Union between a European and a non-European, the male party being domiciled in the Union at the time, than on a marriage between a European and non-European inside the Union.

In the latter case, section 1 (1) (*a*) sets out special circumstances in which such a marriage would be held valid in the Union, and section 1 (1) (*b*) special circumstances in which a child born or conceived of such marriage would be deemed legitimate. In each case one of the requirements is the solemnisation of the union in good faith by a marriage officer.

Now section 1 (2) states that if a male domiciled in the Union enters into a marriage outside the Union which cannot be solemnised in the Union because of the prohibition of inter-marriage between European and non-European, then such marriage shall be *void and of no effect* in the Union.

It is clear from this wording, from the quite separate provisions of section 1 (1) and section 1 (2), and from the reference to 'solemnisation in good faith by a marriage officer' in section 1 (1), that the exceptional case under section 1 (1) (*a*) in which a marriage between a European and non-European would be deemed valid, will not apply to such marriage solemnised outside the Union.

Further, because of the words 'of no effect in the Union' in

section 1 (2) such a marriage would have no secondary consequences,[23] whether arising out of succession rights, with regard to legitimacy of children or in any other way. Section 1 (1) (*b*), which concerns the legitimacy of children, is not applicable for the reasons above given, and the common law, under which the legitimacy of children is determined by their *lex domicilii* of origin (with the possible additional requirement that the marriage was valid by the *lex loci celebrationis*)[24] is apparently shut out by the words 'of no effect'.

Finally, where a female domiciled in the Union at the time, contracts a marriage outside the Union with a male not domiciled in the Union, the one party being a European and the other a non-European, the marriage being valid according to the *lex loci celebrationis*, then the children of the marriage will be considered legitimate if the law of their domicile of origin considers them legitimate; nor will it matter in this connection that the parties acted in *fraudem legis*, for though in South African law the marriage will be invalid on the analogy of *Seedat's Case*,[25] this will not affect the issue of the legitimacy of the children.

II

'*Residing Together*' *under the Matrimonial Causes Jurisdiction Act*, 1945

The South African *Matrimonial Causes Jurisdiction Act*, 1945,[26] is in substantial conformity with the *Matrimonial Causes* (*War Marriages*) *Act*, 1944, of the United Kingdom. Its primary object was to afford relief to a wife where during the late war she married a man domiciled outside the Union, and where to have limited the jurisdiction of the courts in actions for divorce, restitution of conjugal rights or declarations of nullity to the grounds existing prior to the Act, would have led to hardship. Under the South African statute one of the requirements to ground jurisdiction in a division of the Supreme Court is that since the solemnisation of the marriage the parties have not at any time 'resided together' in the country in which the husband was domiciled at the time of such residence.[27] The meaning of the phrase 'resided together' has come up for

[23] As to the meaning of 'secondary consequences', see Wolff, *Private International Law* (1945), pp. 425–6.

[24] See *Seedat's Executors* v. *The Master* [1917] A.D. 302. In this case, applying the above rule, the children of the first marriage were held legitimate even though, being of a polygamous nature, the marriage itself was invalid in South African law as offending its distinctive public policy.

[25] *Supra*, esp. at 311.

[26] Act No. 35 of 1945.

[27] Section 2 (3) (*b*).

consideration in a number of cases, two of which were decided this year. In no judgment was an exact definition attempted. The courts have approached the matter from two angles.

According to the one view, there must be something more than a fleeting visit, a temporary sojourn. In the earliest case, *Hannen* v. *Hannen*,[28] the parties were married in Southern Rhodesia, the country of H.'s domicile at the time, and for three days after the wedding, stayed at a hotel in Bulawayo, awaiting the first available train to the Union. It was held that in the circumstances the parties had not 'resided together'. In *Ex p. Martin*,[29] Clayden J., looking at the purpose of the Act, gave what might be termed a wide interpretation of the phrase, in order that the relief afforded should not be illusory.

> 'This must contemplate, I consider, some setting up of a home there; some choice on the part of the war-time wife to adopt the home of her husband. . . . For them to have "resided together" in terms of the Act there must, I consider, have been some residence designed for the establishment of a place of residence, even though a temporary one.'[30]

It was held that a total period of ten days spent on a visit to H.'s mother in the country of H.'s domicile at the time did not constitute a 'residing together'. The approach of Clayden J. was followed by Herbstein J. in *Ex p. Wood*.[31]

The other view involving a narrower construction was taken by Williamson A.J. in *Danks* v. *Danks*.[32] The learned judge felt that the Act was an inroad on the generally accepted principles of private international law, and that our courts should be careful not to encroach on what would normally be the exclusive jurisdiction of other courts by going one step beyond the strictly defined limits of the jurisdiction conferred by the statute. With this consideration in mind, he considered that

> 'any living together or cohabitation by a man and his wife in the country of the husband's domicile is sufficient to amount to a "residing together" in terms of the sub-section'.[33]

This narrower construction was favoured too by Searle J. in *Ex p. Simmons*.[34] In this case the parties, living together as man

[28] 1946 W.L.D. 319; 1946 (2) P.H., B. 41.
[29] 1947 (4) S.A.L.R. 794 (W.L.D.).
[30] At 796–7.
[31] 1948 (4) S.A.L.R. 435 (C.P.D.).
[32] 1948 (4) S.A.L.R. 492 (W.L.D.).
[33] P. 496. In this case stress was laid on 'living together as man and wife'. W. visiting H. in England, the country of his domicile, was endeavouring to restore marital relations which H. had broken off in the Union. At all material times H. refused to restore normal marital relations. It was held that the relationship of man and wife did not exist.
[34] 1949 (1) S.A.L.R. 150 (C.P.D.).

and wife, went to England on a ' short visit ' to H's mother, and lived for six months in her house. It was held that they had resided together in England.

In the latest case, *Ex p. Griffith*,[35] approval was given to the view that the courts should lean to that construction which least impinges on the principles of jurisdiction existing before the Act, but the court was not prepared to say that any living together amounted to a residing together. Stress was laid on the attitude of W.; has she formulated, even tentatively, the idea of ' abandoning her residence in her own country? ' If so, a much shorter period would be sufficient to constitute a residing together than otherwise, though *semble*, even if the wife had no such idea, it would still be possible to show that the parties had resided together in the country of H.'s domicile.

It is submitted that if regard be had to the purpose of the legislation, the dictum of Williamson A.J. in *Danks' Case*,[36] that any living together as man and wife constitutes ' residing together ', goes too far. The curtailment of the relief afforded by the Act by the insertion of the ' residing together ' clause must surely be considered in the light of the underlying object of the Act : to afford relief to a married woman who, despite marriage to a man not domiciled in the Union, continues to keep her associations rooted in South Africa. The ' residing together ' clause can only refer to the severance or at least weakening of these roots. Beyond this, it is not possible to go. No exact definition, it is believed, is possible, and the courts will have to infer from the circumstances whether there has been a ' residing together '.

III

Proof of Foreign Law

In *Ambassador Factors Corporation* v. *K. Koppe & Co.*,[37] Dowling J. held that where there is no evidence of a foreign law which is alleged to be applicable by South African rules of choice of law to the issue, the court must apply the rules of South African domestic law. In the past the courts have approached the matter along three lines :

(i) The court applies South African internal law as being the only law before the court.[38]

[35] 1949 (3) S.A.L.R. 235 (N.P.D.).
[36] *Supra.*
[37] 1949 (1) S.A.L.R. 312 (T.P.D.).
[38] *Schapiro* v. *Schapiro* [1904] T.S. 673; *Estate Cassim* v. *Cassim* (1915) 36 N.L.R. 14 at 21; *Hairman* v. *Crawley* [1918] O.P.D. 16 at 22.

(ii) The court presumes that the foreign law is the same as South African law.[39] The practical result is the same as in (i), but the presumption is demonstrably untrue.

(iii) Failure to prove the foreign law will cause plaintiff to lose his action or defendant to fail in his defence, according as the one or other relies on the unproved foreign law.[40]

It is submitted that on logical grounds the last approach is to be preferred.

ELLISON KAHN.[41]

THE DISCHARGE OF FOREIGN CURRENCY OBLIGATIONS

In *Freund* v. *Laenderbank Wien Aktiengesellschaft* (Supreme Court, New York County, *New York Law Journal*, June 29, 1949), the plaintiff as assignee sought to recover the balance of salary or other compensation and the pension rights claimed by Kurt Epler, formerly a director and employee of defendant or its predecessor bank in Vienna prior to August, 1938, when Epler was notified by the bank that his service relationship was terminated. It was not disputed that Epler's discharge was not in any way due to fault or misconduct on his part. Mr. Justice Valente found for the plaintiff in respect of each of these claims. The question arose as to the assessment of damages. An expert witness (Dr. Martin Domke) testified that the exchange value of the mark, as established by the plaintiff at forty cents in American currency, was the value of the *free* as contrasted with the *blocked* mark. The witness testified that the value of the blocked mark of the kind which would be paid on claims by emigrés such as that before the court was about five cents in American currency at the date of the breach of the agreement by defendant. Damages were accordingly assessed by the judge on the basis of the value of the blocked mark. The importance of this decision lies in the fact that it deals with exactly the same point as the English case *Graumann* v. *Treitel* [1940] 2 All E.R. 188. In that case a German resident had covenanted to pay in Germany a sum in German marks to another German resident. Later both parties had emigrated to this country. The plaintiff claimed from the defendant payment in sterling of a sum equivalent to the sum in marks promised by the defendant calculated at the official rate of

[39] *Schnaider* v. *Jaffe* [1916] C.P.D. 696 (subject to reservations); *Daya* v. *Gardee* [1934] W.L.D. 31 at 41; *Ex p. Gani* [1942] T.P.D. 178 at 181; *Rogaly* v. *General Imports (Pty.), Ltd.*, 1948 (1) S.A.L.R. 1216 at 1227–1230.

[40] *Rouhier* v. *Master and Owners S.S. 'Mesnafos'* (1917) 38 N.L.R. 429; *Levy* v. *Levy* (1904) 18 E.D.C. 164; *Consolidated Estates and Trusts, Ltd.* v. *Turnbull* [1924] T.P.D. 1 at 5.

[41] Lecturer in Law, University of the Witwatersrand, Johannesburg, South Africa.

exchange on the day on which the sum was originally payable. As on that date both parties were no longer in Germany, the plaintiff could, if the promised payment had been made in Germany as covenanted, only have received payment to a blocked account. Such blocked accounts were at the time quoted in London, Zürich and New York at an unofficial rate many times lower than the official rate. The plaintiff by claiming payment at the official rate of exchange thus claimed much more than he could have obtained by a proper performance of the contract. He was fortunate enough to be successful in his claim, but reasonable enough to settle after he had obtained judgment at one-third of the sum awarded to him. The decision—which is also open to doubt on a good many other points—has been the subject-matter of well-founded criticism by a number of legal writers. Reference may be made to Dr. Kahn-Freund's note in 4 *Modern Law Review* (1940–1) 148; Samuel, 'Migrations and Private Law', 6 *Univ. of Toronto L.J.* (1946) pp. 145 ff. at 156–163; Dicey-Morris, *Conflict of Laws*, 6th ed. (1949), p. 744.

Although Mr. Justice Atkinson has followed his own decision in *Graumann* v. *Treitel* in a later case, *Ainsberg* v. *Canadian Pacific Steamships, Ltd.*, 66 Lloyd's List L.R. 206, some doubt may be thrown on it in view of the decision of the Privy Council in *Marrache* v. *Ashton* [1943] A.C. 311. Admittedly this case did not deal with exactly the same question. Here the defendant had promised to the plaintiff payment in Spanish pesetas at Gibraltar, where Spanish pesetas were not legal tender, but merely a commodity. The Privy Council held that the plaintiff could not demand payment in sterling at the 'official' rate adopted by the Spanish Customs house at the frontier, but merely at the much lower rate obtaining in the market in Gibraltar. Provided that this market was 'recognised and accessible', the rate of exchange obtaining there was the proper one, though the Board did unfortunately leave in the dark the question by whom the market should be 'recognised', and to whom it should be 'accessible'. The decision in any case still left room for the *Graumann* v. *Treitel* principle that the official rate applies where payment in legal tender had been promised.

The extent to which courts feel themselves attracted by any 'official' character attached to a rate of exchange, has been most significantly illustrated by the decision of the Court of Appeal in *Re Parana Plantations, Ltd.* [1946] 2 All E.R. 214. In that case the liquidator of the defendant company was entitled to discharge a liability expressed in German currency by payment in sterling at the rate of RM 40 to the £, provided 'he thought that was the fairest and most satisfactory method of arriving at a

valuation '. The court had been informed that there was at the present time an official rate of exchange ruling in Germany—at any rate, for the purposes of the forces of occupation—and that this was RM 40 to the £. It is unfortunately obvious from this that the court had been sadly misinformed about both the legal and the factual position in Germany. Legally no exchange transactions were permitted in Germany. Under Military Government Law 53 all such transactions had been declared illegal and void, unless a special licence had been issued by Military Government or an office or agency authorised by Military Government. One of the exceedingly few licences thus granted enabled members of the armed forces in the British zone—and only there—to purchase from the official Military Field Cashiers' Offices, German marks at the rate of RM 40 to the £. This rate was at practically all times entirely artificial. In the first few weeks after the collapse of the Hitler-Reich it enabled members of the Allied armed forces in the British zone to make purchases at a fairly favourable rate. The German currency, however, was soon brought down to its proper level, and by 1946 the rate of RM 40 to £1 had become a matter of strong complaints amongst members of the British military forces, who knew only too well that marks were exchanged at the so-called Black Market at rates of between RM 100 and 250 to £1. By August 1, 1946, Military Government was forced to render even the sale of the special British Armed Forces' Vouchers—which had replaced sterling notes in order to make illicit exchange transaction more difficult—a criminal offence, punishable by any punishment other than death. There could therefore be no question at all of any official character for exchange transactions of the rate of RM 40 to the £ in Germany at the time when the Court of Appeal was considering this case. Still less was it possible for any realistic observer to treat this rate as fair and reasonable. While, therefore, the judgment as such cannot stand factual criticism, and while the court's attachment to the so-called official rate is regrettable, it is perhaps significant that the court modified this attachment by the proviso that it should only apply, provided it appeared fair and reasonable to the liquidator. This may be taken as an admission that even the official rate may not always constitute the last word.

It is, therefore, perhaps not impossible that the English courts might, if they have an opportunity to reconsider the question, have some sympathy with the point of view taken by Mr. Justice Valente in this New York case. In this case the court, relying on the evidence of a most experienced international lawyer, adopted the exchange rate for blocked accounts as the proper rate. It is believed that this rate is indeed the correct rate in those cases in

which the plaintiff could not expect payment in free currency. It should, however, be said that this rule does not constitute a patent medicine applicable alike in all manner of cases. In respect of many currencies there are different rates for the different types of blocked accounts, and it must be open to the plaintiff to prove the type of the blocked account which he would have received if payment would have been duly made to him. Also the plaintiff cannot possibly be excluded from adducing evidence to show that he would have had a chance of obtaining a special licence unblocking his account with the effect that he might at some later stage have received free currency. It may be difficult to assess such chances in terms of hard cash, but the task is certainly not more difficult than those of many other types of guesswork-puzzle which our courts have daily to solve.

There remains one other point. In *Freund* v. *Laenderbank, Wien, Aktiengesellschaft*, the plaintiff claimed and was awarded damages. In *Graumann* v. *Treitel*, on the other hand, the plaintiff presented his claim not as a claim for damages but as a claim founded on debt, and the court found in his favour on this point. It may be hoped that this unreal and unnecessary distinction may now be considered as obsolete since the Court of Appeal in *Madeleine Vionnet et Cie* v. *Wills* [1940] 1 K. B. 72, pointed out that the difference between damages and debt did not matter for the question of the date whose rate of exchange applied. The court said that there was ' no logical ground ' for the distinction. It should therefore apply to the question of the proper rate as little as to the question of the proper date. It may be added that the Privy Council also failed to make this distinction in *Syndic in Bankruptcy of Salim Nasrallah Kkoury* v. *Khayat* [1943] A. C. 507.

E. J. Cohn.[1]

A Dutch Judgment Concerning Hungarian Foreign Exchange Regulations [2]

On December 19, 1928, Kleinwort, London, entered into an agreement with the Hungarian Commercial Bank of Pest, Budapest, Hungary, which was amended as of October 30, 1930. Article 12 of the latter agreement provided that it was subject to the laws of the State of New York. Relying on Article 8 of the agreement, as amended as of October 30, 1930, which read as follows :

(The creditors) ' are entitled to assign and transfer the whole

[1] Of Lincoln's Inn, Barrister-at-Law.

[2] Judgment of the Court of Second Instance of Amsterdam; January 15, 1947. Reported in *Netherlands Jurisprudence*, 1948, No. 130.

or any part of their claim or claims against us arising hereunder, and the transferee shall have the same rights and powers, etc.' Kleinwort assigned its claim against the Hungarian Commercial Bank of Pest to the Trust Company Rokin of Amsterdam. The Hungarian Bank confirmed the transfer on March 1, 1941, without any reservation whatever. The Trust Company Rokin sued the Hungarian Bank in the Court of First Instance with General Jurisdiction in Amsterdam, requesting payment of the amount due. The Court of First Instance granted relief to the plaintiff. Defendant appealed to the Court of Second Instance in Amsterdam.

Defendant contested the validity of the assignment of the claim by Kleinwort to the trust company on the ground that the assignor and assignee had not intended a genuine sale and purchase of the claim, but that the true purpose of the transaction was to make a Netherlands court competent to take jurisdiction of the matter. The defendant contended that this showed an unlawful intent to violate regulations concerning the competency of courts. The court rejected this argument, stating that it could not see why it should be unlawful to bring the case within the competency of the Netherlands court if this was accomplished by lawful means, and the court therefore held that the assignment was valid and binding.

Inter alia, the defendant pleaded the Hungarian Foreign Exchange Regulations, which forbade payment and transfer to the Netherlands. His argument ran as follows : In view of the fact that all States have foreign exchange regulations, and that there is no longer free exchange, so that each payment of a foreign claim is dependent on a licence from a Government, proper intercourse between States is only possible if the States mutually recognise each other's regulations. Public policy, therefore, no longer prevents the application of the foreign exchange regulations of a foreign country as it did at the time when these were the exception and free exchange was the rule. On the contrary, public policy requires the application of these regulations.

The court rejected this argument stating : ' Appellant made many mistakes in his reasoning; specifically it may be mentioned that recognition of the reasonableness of, or even of the need for, certain foreign statutes, even if such recognition is based on the fact that similar statutory regulations exist in any particular country, and in nearly all other countries, will never result in foreign exchange regulations acquiring the force of law in another country. In other words, Netherlands public policy will never require the application of Hungarian law in the territory of the Netherlands with respect to an agreement which is not subject to Hungarian law '.

The court stated that the agreement was subject to American law, and observed : ' Hungarian foreign exchange regulations are not incorporated in the laws of America, and specifically not in the laws of the State of New York, nor does the public policy of this State provide for the application of foreign [Hungarian] law on an agreement which is subject to American law '.

The court therefore upheld the claim of the original plaintiff.

Edward V. Saher.[2]

[Note. On the point of foreign exchange control regulations, this case follows the view adopted by the Court of Appeal in *Kleinwort Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft* [1939] 2 K. B. 678. There, the defendants, Hungarian parties, had guaranteed payment of a bill governed by English law. At the date of maturity, the Hungarian Exchange Regulations made it illegal for Hungarian subjects to pay money outside Hungary without the consent of the Hungarian National Bank. This consent had not been obtained. It was held that the contract to pay made by the defendants was governed by English law, and was to be performed in England, and was therefore enforceable in England even though its performance might involve a breach of Hungarian law by the defendants. Editor.]

Divorce and the Italian Courts

Whether the Italian courts may grant a divorce to citizens of other countries is at present an open and much debated question, both in the courts and among legal writers. A judgment given by the Court of Milan on March 11, 1948,[1] provided an opportunity for examining and discussing anew the various aspects of the problem. In this case, the court held that the Italian courts could not apply a foreign law which was contrary to Italian public policy, and that to grant a divorce was contrary to Italian public policy. The judgment contains several statements with which the present writer cannot agree.

The court in fact bases all its reasoning on what it erroneously terms a point not under discussion, namely, that it cannot rest its decision on Article 3 of the Second Hague Convention, 1902, which was approved by the law of September 7, 1905, taken in conjunction with Article 17 of the *Preleggi* (General Regulations governing the Italian Civil Code), because even if this were otherwise possible,

[2] Consultant on Netherlands Law, New York; Treasurer of the International Bar Association.

[1] *Monitore dei Tribunali*, 1948, No. 582, p. 232.

application of these provisions is excluded by Article 31 of the same regulations, under which the foreign law which would otherwise be applied by the Italian courts is excluded as being contrary to the public policy of the country.

It is proposed to consider this assertion with a view to establishing that it is unsound, and to demonstrate that the application of the appropriate foreign law to the case of the foreigner in Italian territory is not contrary to Italian public policy, and that divorce should not fall within the purview of Article 31 of the *Preleggi*. It is then proposed to examine Article 3 of the Hague Convention, and Article 17 of the *Preleggi*, and the manner in which these provisions should be applied.

It is submitted that the Court of Milan did not examine the doctrine of public policy with sufficient care. One of the principal arguments of the court was : Italian law ignores divorce; therefore the Italian courts cannot grant a divorce. In fact we are back to what Savigny wrote a century ago.[2] It was held at that time that, because of the operation of doctrines of public policy, it was impossible to apply any legal principle foreign to the legal system to which the judge called upon to take a decision belonged. But it has long since been demonstrated that the doctrine of public policy is invoked to deny an application of foreign law if it would offend the moral sense of the forum. Now this offence is produced, if it is produced at all, just as much by recognising[3] a foreign judgment which has dissolved by means of divorce a marriage contracted between foreigners, as by directly granting them a divorce in accordance with their own national law.

If the principle of public policy really operated in the way laid down by the Court of Milan, the rules of private international law would lose most of their usefulness, and this would be repugnant to a legal system such as that of Italy. It is stated in various parts of the Constitution (*e.g.*, Article 10) that due consideration should be given to other legal systems. It cannot, moreover, be held that the meaning of public policy, or for that matter the idea of morality, is so inflexible as is suggested in this judgment. Thus, in Italy, while divorce appeared so repellant to the legislators of 1865 (cf. Pisanelli's report to the Senate), it does not necessarily appear in the same light today. (Cf. Brunelli : 'Divorce and Nullity of Marriage.') Italy must not refuse to apply any principle which is foreign to legal notions unless that principle, as in the case of slavery, would deeply offend her ethical and social sentiments.

[2] See Fedozzi, 'Quelques considérations sur l'idée d'ordre public international', in *Journal de droit intern. privé*, 1897.

[3] Through the procedure before the courts known as *delibazione*.

Although Italy is one of the few countries in Europe where the law does not contemplate divorce, she has adhered by legislation from 1905 onwards to the Second Hague Convention of 1902. And not only has Italy never withdrawn from this international agreement but, unlike certain other nations which do admit divorce, she has not progressively renounced her adherence, so that she is consequently bound to observe the convention.

Furthermore, Italy has, for many years, rendered effective in her own national territory decrees of divorce granted to foreigners, even when the parties concerned were not always of foreign origin but were, as was frequently the case, persons who had renounced Italian nationality simply in order to secure a divorce abroad. Even when such persons sought to re-acquire Italian nationality, the Italian Government rarely availed itself of the powers contained in Article 9 of the law (No. 555) of June 13, 1912.[4]

If the objection be raised, as it was by the Court of Milan, that Article 31 of the *Preleggi* to the present Civil Code, implies that in no event may the laws of any country be enforced in Italian territory should they be contrary to Italian public policy, this provision could, in my opinion, be applied only if divorce came into the aforementioned category. However, there are many Italian regulations touching the subject-matter of divorce. It suffices to refer to Article 101 of the Royal Decree (No. 1238) of July 9, 1939, concerning register offices, in which provision is made for the hypothetical case of a foreigner who has been divorced and wishes to remarry in Italy. It should be noted that the judgment under consideration maintains that no mention of divorce is made in the regulations concerning register offices. There is also the law (No. 555) of June 13, 1912, which should be considered in relation to Article 59 of the Decree of July 9, 1939, which is quoted in connection with the question of the power of a woman who has lost her nationality through marrying a foreigner to regain it after obtaining a divorce. And, above all, reference may be made to Article 3 of the Hague Convention, which clearly affirms the principle, accepted by the Italian Civil Code, of the possible application to foreigners of their own national law, and Article 7 of the same convention, which lays down that divorce is to be recognised ' anywhere ', subject to provisions in other clauses of the convention. Moreover, once the law was passed which rendered the convention ' wholly and entirely effective ', this international agreement became a part of the domestic law of Italy.

[4] Under which the Government may in certain circumstances refuse to permit a person who has lost Italian citizenship to re-acquire it.

In Italy, therefore, divorces granted to foreigners (even, as we have seen, if they are of Italian origin) may be recognised, and such foreign decrees will be given practical effect in Italy. Now, on the argument advanced by the Milan court in the instant case, this practice ought to be contrary to the provisions of Article 31 of the *Preleggi*. But it is submitted that there is no justification for the Milan decision, which can only rest upon the fact that divorce is not included in the legal system of Italy. But this does not constitute sufficient ground for the application of Article 31.

That the declaration of the Court of Milan does not meet with the approval of other judicial bodies may be clearly seen from a recent judgment of the Supreme Court of Judicature.[5] The court was called upon to rule on the question whether it was possible to recognise in Italy a divorce granted to foreign nationals, where the original decree was pronounced in a country which did not adhere to the Hague Convention. The court decided, it is submitted correctly, that such a decree should be recognised. In its judgment the court stated :

> ' The Supreme Court of Judicature considers that the question should be examined anew, since it is no longer possible to distinguish between judgments given in countries which are not signatories of the Hague Convention and those which are, with a view to rendering effective only judgments pronounced by the second. Italy's adherence to the said Convention, through which she guarantees to render effective in Italy foreign divorce decrees, clearly means that, although divorce does not figure in the Italian legislative system, the foreign judgment is not in itself contrary to our internal public policy. Italy undertook, without any reservation, to render these judgments effective, and this decision cannot be limited only to judgments given by the courts of other contracting parties . . . . The recognition . . . that the granting of a decree of divorce is not contrary to public policy is of an objective nature . . . and the *inquiry concerning public policy . . . cannot be said any longer to have any bearing on the pronouncement of divorce.* Nor can the condition of reciprocity now be insisted upon. It should be noted that the country which does not adhere to the Hague Convention, and in which a decree of divorce has been granted, provided divorce is contemplated by the legislation of that country, cannot object that a foreign divorce decree is contrary to its own public policy. Thus, there should be no lack of reciprocity. It is also a fact that among the countries which

[5] July 13, 1939. *Foro Italiano*, 1939, I, col. 1097.

signed the Hague Convention on the 12th June, 1902, were some whose legislation did contemplate divorce, and some where no provision was made for it. . . '.

It is submitted that this is a desirable conclusion.

The present writer does not agree with another theory which has long been discussed by jurists, but which does not appear in the judgment of the Milan court; namely, the idea of drawing a distinction between the pronouncement of a divorce decree and the recognition of a decree of divorce, and of being less tolerant towards the former. Professor Carnelutti,[6] a well-known jurist, rightly objected to the tendency of the Italian legal system to be more reluctant to accept a foreign judgment than to accept foreign law, because a judgment carried more practical effects. Another well-known Italian jurist, Bassano, has pointed out that the writers who maintain the distinction have always accepted the fact that if foreign law and foreign judgments are not identical, they are closely analogous. Thus, the doctrine that public policy does not permit the grant of divorces in Italy, but is not averse to rendering valid foreign divorce decrees, is not one which is very clearly established.

The present writer also disagrees with another theory according to which the granting of divorce by an Italian judge is ' a more serious matter ' than rendering valid a similar foreign judgment. This doctrine is supported by Cansacchi who thinks that greater harm [7] would be done to internal public policy by incorporating the foreign law in the Italian legal system, than by recognising a decree of divorce granted by a foreign court. Cansacchi bases his reasoning on the idea that ' the recognition of a foreign divorce decree has less repercussion on the legal system within which it takes place than that which would be caused by a decree of divorce granted by a judge belonging to a country whose legislation ignores divorce ', and that consequently ' the latter would be much more against internal public policy than the former '.

It is submitted that the question is not one of greater or less difference of effect or of being more or less against public policy, but simply whether or not divorce offends against Italian public policy. If it is, not only is it impossible to make the distinction, but the offence embraces the whole idea of divorce and is in no way dependent on the method and the procedure through which the divorce became effective in the Italian legal system.

But since the Court of Milan specifically referred to those ' religious and moral sentiments ' which are said, with some

[6] See *Clausole di rinuncia alla legislazione italiana*, Arch.Giur., 1923.
[7] *Ecclesiastical Law* (1943), p. 108.

exaggeration, to be a distinct and positive quality of the Italian people, some comment may be offered. Apart from the fact that such nations as the United States, France and Switzerland, which are among the States which do admit divorce, cannot be considered inferior in standards of religious and moral sentiments to Italy, it is not considered that Italy is acting in a particularly laudable way in refusing to recognise divorce. It is not a desirable moral standard to insist on maintaining ties which by the parties, and frequently by the rest of society, are regarded as no longer effective, and which lead to nothing but adulterous relationships and offspring whose status often unfortunately cannot be legalised. The Concordat of 1929 with the Holy See, and in particular Article 34, which entrusts to the church jurisdiction to annul the marriage bond and to grant dispensations from non-consummated marriages, severely limits the possibility of introducing divorce in Italy, and the various governments which have succeeded each other from 1929 until the present day have made political capital out of the question. It should be realised that the problem is political rather than moral, and the proof of it is provided by the parliamentary debate over Article 24 of the proposed Constitution of the Italian Republic.

But let us pass over these considerations which are outside our present theme, and let us remember that we are discussing the question of divorce granted to foreigners, not to Italian citizens, and whether or not it should be possible for an Italian judge to grant such parties a divorce decree on the basis of their own national law.

Having discussed the question of the pronouncement of a decree of divorce from the standpoint of the application of public policy notions under Article 31 of the *Preleggi*, let us briefly consider Articles 1, 2 and 3 of the Second Hague Convention. Article 1 provides that the spouses may not petition for divorce unless divorce is contemplated both by their own national law and by the law of the place where the petition is presented. Article 2 states that it is possible to petition for divorce only if, in the case in question, divorce is contemplated both by the national law of the spouses and by the law of the place where the petition is presented, although on different grounds. Finally, Article 3, which deserves careful attention and comment, states : ' Notwithstanding the rules laid down in Articles 1 and 2, the national law only shall be observed if the law of the place where the petition is presented prescribes or allows this '.

What then does Article 3 mean ? ' Notwithstanding ' can only mean ' in spite of the existence of '. In other words, on the hypothesis that the law of the place where the petition is presented (in this case Italy) prescribes (as does Article 17 of the *Preleggi*) or allows foreign law (in general and not only that regarding divorce)

to be applied to foreigners by the courts of the country where the case is presented, Articles 1 and 2 should be disregarded and the foreign law alone should govern the relations between the spouses.

In conclusion : Italy recognises that foreign law is applicable to non-Italian citizens, and this is in accordance with a specific law (Article 17). The Court of Milan maintains that this Article should be read subject to Article 31 of the same *Preleggi*, leading to the conclusion that pronouncement of a decree of divorce is against public policy. It has been argued that it is quite out of place to talk of divorce being against public policy. Moreover, a reading of Article 3 of the Hague Convention together with Article 17 of the *Preleggi* reveals that Articles 1 and 2 of the convention do not impose an impediment to the pronouncement of a decree of divorce by Italian courts in the case of foreigners. In their case there should be an application of the national law of the parties.

Avvocato Vittorio Emanuele Orlando, Jr.[8]
(*Translated by E. D. Nissim and Margaret Hyman*)

United Nations : Notes on the General Assembly's Fourth Session

What is an 'international conference'? This question raised a lively argument in the Legal Committee, when considering the draft rules for the calling of international conferences, proposed by the Economic and Social Council in execution of the provisions of Article 62 (4) of the Charter.[1]

Two interpretations of Article 62 (4) were given. The first was that the expression 'international conference' means a conference of States only. In support it was said that the paragraph is to be read closely with that preceding it [2] and is concerned with conferences at which inter-governmental conventions on economic and social matters will be prepared; that Article 71 [3] sufficiently covers the cases where the Economic and Social Council thinks fit to harness experts and non-governmental organisations to the task

[8] Member of the Italian Bar, practising in Milan.

[1] 'It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters within its competence.'

[2] 'It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.' In fact in an earlier draft at San Francisco, paragraph 4 preceded paragraph 3, it being assumed that the Economic and Social Council would only seldom prepare conventions itself.

[3] 'The Economic and Social Council may make suitable arrangements for consultation with non-governmental organisations which are concerned with matters within its competence. Such arrangements may be made with international organisations and, where appropriate, with national organisations after consultation with the member of the United Nations concerned.'

of carrying out the economic and social policies of the Charter,[4] while Article 68 provides for the establishment of bodies of experts for long-term studies; that the proper conclusion to be drawn from an examination of Articles 62 (4), 68 and 71 taken together is to limit conferences called under Article 62 (4) to governments; and that in any case tradition demands that 'international conferences' should be applied only to those in which States participate.

The second interpretation was that the expression includes conferences of experts and of non-governmental organisations, working in the field of Chapter X of the Charter; that there was no ground of history or international practice upon which the limitation of international to 'inter-State' or 'inter-governmental' could rest; that Articles 68 and 71 were concerned with quite distinct functions of the Economic and Social Council and were not to read as explanatory, much less restrictive, of its powers under Article 62 (4); and that was therefore no legal ground for limiting in the rules under discussion the powers of the Economic and Social Council and it should be enabled to call conferences not only of governments but of experts[5] and non-governmental organisations.

It is submitted that the second interpretation is the better. There is no reason for reading 'international' in Article 62 (4) in any but its normal sense, that is to say, pertaining to the relations between persons or things from different countries. This meaning is clear, sufficient and not contrary to any other provision of the Charter; there is therefore no need to resort, for purposes of interpretation, to the records of the San Francisco Conference; and in fact there is nothing in those records which is decisive on the intended meaning of the expression in Article 62 (4).[6]

J. E. S. FAWCETT.[7]

(Further notes on the General Assembly's Fourth Session will appear in the next issue.)

[4] Set out in Chapter X.

[5] The Economic and Social Council has already convoked two conferences of experts.

[6] In paragraph 27 of the report of the Technical Committee of the San Francisco Conference there is a reference to Article 62 (4) and the Committee speaks of 'Conferences of Members' (*viz.*, of U.N.): but as the Economic and Social Council frequently invites *non*-members to conferences (for example, the World Health Organisation Conference and the Havana Trade and Employment Conference) this language cannot be taken as authority for limiting the meaning of 'international conferences' in Article 62 (4).

[7] United Kingdom Delegation to the United Nations.

Aliens and the End of the Transitional Period in Egypt

The end of the transitional period on October 14, 1949, marked the disappearance of the last vestiges of the capitulations and the final liquidation of the Mixed Courts in Egypt. It may be of some interest to recall the history behind the capitulations which goes back to the Ottoman conquest of 1517.

On September 20, 1528, Suleyman I (the legislator) met the needs of the French and Catalan merchants of Alexandria by granting a *hatti-Sherif* confirming the privileges they had enjoyed since the Circassian Sultans of Egypt. This act served as a basis for the capitulation granted to the French in Ottoman dominions shortly afterwards in February, 1535. Great Britain and other western States followed France in having, through the most-favoured-nation clause, the same rights of treatment for their nationals in Ottoman dominions. The status of aliens in Egypt was then governed by Ottoman capitulatory treaties. The position of aliens, however, developed greatly in the nineteenth century through customary rules, and in a considerable number of cases reached results absolutely contrary to those provided in the capitulatory treaties. This led to a state of judicial chaos in which about seventeen consulates were rendering justice to their countrymen.

The efforts of Nubar Pasha, Foreign Minister of Egypt to Khedive Ismail, which began in 1867, had eventually culminated in the conclusion of the Reform agreement and the establishment of the Mixed Courts in 1876. The main field of jurisdiction of the Mixed Courts was civil and commercial disputes between aliens and Egyptians and between aliens of different nationalities. As for disputes between aliens of the same nationality, these were reserved for consular jurisdiction together with criminal matters affecting aliens. Naturally, the establishment of the Mixed Courts brought about a position in which a unified rule of law was applicable to the majority of aliens in the country. This ' mixed law ' consisted substantially of four codes, namely, the civil, commercial, maritime and civil and commercial procedure. For these codes the Code Napoléon was taken as a basis. But Egyptian criminal law was not binding on aliens and in consequence the Government was left practically powerless in combating crime. In many cases accused of several nationalities were involved, each with his own consular representative and jurisdiction. Russell Pasha, a living authority on this subject, points out in his book *Egyptian Service, 1902–1946*,[1] the enormous difficulties that the capitulations put in the way of the

[1] John Murray, London, 1949, pp. 26–7, 227–9.

police generally, and particularly in the fight against the drug traffic. 'Had it not been for the protection', Russell Pasha maintains, 'that the foreign trafficker derived from them, the narcotic problem in Egypt would never have reached the magnitude it did, and the 90 per cent. improvement today could have been achieved in a quarter of the time with a quarter of the expenditure of police time, funds and energy'.

It was the duty of the Egyptian Government, following an agreement with the capitulatory powers in 1911, to submit new legislation to the 'Legislative Assembly' of the Mixed Courts for consideration before it became binding on aliens. The 'Legislative Assembly' was composed of one member of each of the thirteen capitulatory States. The Mixed Courts, therefore, though initiated to replace the capitulations, formed a special but integral part of the system of privileges enjoyed by aliens until 1949.

The question of capitulations, the Mixed Courts and the protection of the lives and property of aliens furnished an interesting episode in the political history of Anglo-Egyptian relations. Lord Cromer, in 1904–1906, worked out a formidable scheme for reform, but this was never implemented. The Milner Mission, of which Sir Cecil Hurst was the legal member, recommended some proposals on different lines which were unsuccessful. Again, in all attempts made to settle Anglo-Egyptian relations in the years 1921, 1927, 1929 and 1930 the problem of capitulations invariably figured. It was only the signing of the treaty of alliance between the two countries on August 26, 1936, that gave the *coup de grâce* to the capitulatory system in Egypt.

The conclusion of the Montreux Convention on May 8, 1937, ended the anomalous position of aliens and provided for rules governing their status during the transitional period of twelve years. The results of the Convention so far as they affected the status of aliens in Egypt were drastic and far-reaching. In the first instance, to restore the territorial supremacy of the State and enable Egypt to exercise jurisdiction over aliens, the consular courts were suppressed from October 15, 1937, except for matters of personal status during the transitional period. The Mixed Courts in turn were only maintained for the transitional period, during which period they were made subject to an important qualification, that as far as possible the institution should be Egyptianised. In all civil and commercial disputes between aliens of the same (and this was an innovation) or different nationality and between them and Egyptians, jurisdiction was vested in the Mixed Courts. Article 2 of the Montreux Convention terminated the legislative function of the Mixed Courts as well as the need for the assent of the capitulatory powers which

was sometimes required for the application of Egyptian legislation to foreign residents in Egyptian territory. And for the first time the Egyptian penal code became binding on aliens as from October 15, 1937 (though it was applied by the Mixed Courts).

The Montreux Convention, when it had ended the anomalous position of aliens in Egypt, laid down provisions governing the status of aliens in the transitional period. But the Convention did not, and in fact was not expected to, provide rules governing the status of aliens after October 14, 1949. Therefore, in the absence of special treaties, the future status of aliens was to be subject to the general principles of international law.

Now that Egypt has attained her territorial supremacy, there exists a single body of legislation administered by the municipal courts and binding on aliens and nationals alike. Race, religion and nationality will then be a matter of indifference to the municipal courts, whose powers are exercised, of course, within their territorial limits. Aliens will be subject to the jurisdiction of the municipal courts in every respect. In criminal cases, the municipal courts had only exercised a limited jurisdiction over aliens who did not benefit from the Montreux Convention, such as the foreign nationals of South American Republics and the Arab States. But their long experience in criminal matters, both generally and particularly in applying the same code which had been concurrently applied by the Mixed Courts since 1937, should enable them, now that their jurisdiction is co-extensive with territorial boundaries, to perform their duty justly and efficiently. In civil matters, the fine record and long training of the judges of the municipal courts should leave no doubt that, although a new civil law is administered from October 15, 1949, justice will be done without any discrimination whatsoever against aliens. Commercial litigation may at the beginning give some difficulty. The judges of the municipal courts had in fact little practice in commercial cases, which were largely brought before the Mixed Courts. But this difficulty may be overcome partly by the incorporation of the Egyptian judges of the Mixed Courts into the personnel of the municipal courts, which has already taken place, and partly by reference to the series of reported decisions of the Mixed Courts.

In matters of personal status affecting aliens in Egypt, the municipal courts which are also competent will as a rule apply the national law of one or more of the foreign parties to the suit. Admittedly, the municipal courts are without great experience in such matters, although they did have jurisdiction over aliens who did not benefit from the Montreux Convention. It is clear that the application of the national law of a foreign party to a suit of

personal status is merely an enforcement of the rules of *renvoi* of Egyptian municipal law, much in the same way that English courts apply in matters of personal rights the law of the domicile.

It will be the duty of aliens in Egypt to give temporary allegiance to the State. Under the capitulatory regime it was difficult to say whether resident aliens had any allegiance to Egypt. It is reasonable to assume, though it is rather a theoretical question, that their mere existence on Egyptian territory entailed a certain degree of allegiance. At any rate, this allegiance, if it existed at all, was faint and overshadowed by the right of aliens to be tried by their own judges and laws. The degree and extent of allegiance expected from aliens should be determined in the light of international practice.

There may be some speculation about the future status of aliens in Egypt. But Egypt's failure to perform her duty of protection and of doing justice to aliens, will involve her in international responsibility. The Egyptian Government had further expressed in a declaration attached to the Montreux Convention its preparedness to conclude 'treaties of establishment and friendship' with the various powers. The idea behind it was to show the good will of the Government towards aliens (including foreign corporations) after the transitional period. With the approach of the end of the transitional period it became known, in July, 1949, that the Government, in spite of some opposition, intended to conclude treaties of establishment for a period of five years with such States as required them. What will come out of the Egyptian Government's intention has yet to be seen.

Let us pay tribute to the magnificent service rendered by the Mixed Courts to the cause of justice in Egypt. These courts, which were national in law and international in fact, were the fine example on which the municipal courts were modelled in 1883. The mixed codes were the jus gentium on whose lines the municipal codes were enacted eight years later. Now that that great institution for good has entered history, the restoration of Egyptian sovereignty over aliens should not overshadow the debt of gratitude the Egyptians owe to the Mixed Courts as a healthy body for the administration of justice. The best homage that can be paid to their memory is to make use to the utmost of the unrivalled wealth of jurisprudence they left behind during their lifetime of seventy-four years. It is the duty of the municipal courts to keep up to the standards of independence, integrity and tradition cherished by the Mixed Courts of Egypt.

G. D. BARAKAT.[2]

[2] Oriel College, Oxford; LL.B. Cairo.

BOOK REVIEWS

Der Neubürger im Internationalen Privatrecht, Teil I. By Murad Ferid. J. C. B. Mohr (Paul Siebeck). [Tübingen. 1949. 113 pp.]

Any person who becomes a national of a State to which he did not previously belong may be called a *Neubürger* (New Citizen). A wealthy Englishman who dissolves his English household and settles in Cannes, where he becomes domiciled and naturalised, is a *Neubürger* in France. The author, however, uses this term in a much narrower sense. He is not interested in isolated cases of change of nationality, but in the fate of the millions of men, women and children who abandon their country as refugees from political, racial, and social persecution, or flee from it before the invading enemy, or are ordered by some authority to settle in a territory unknown to them. Is there any reason for differentiating between the ordinary alien who has settled voluntarily in the country of his choice, and those masses of unhappy victims? Great as are the sociological differences, the present law hardly distinguishes between them. But *de lege ferenda* it is desirable that such distinction should be drawn. Thus, the Institute of International Law (Brussels, 1948), has examined the legal situation of groups of displaced persons and—accepting Professor Gutteridge's suggestion—has recommended a substantial improvement in the field of divorce jurisdiction. It proposes that persons who have been compelled to leave their country and are forcibly prevented from returning should be allowed to sue for divorce or judicial separation in the court of the habitual residence of both or even of one of them; see 42 *American Journal of International Law* (1948) 861–3.

The term *Neubürger*, taken literally, would seem to apply only to such displaced persons as *have* changed their nationality. But for the purposes of the article under review the designation also covers persons who have applied for naturalisation in their country of residence but whose application has not or not yet been granted. Even less is sufficient. Many of the displaced persons or fugitives do not wish to be naturalised; they are satisfied with a residence in the new country or even with a transitory sojourn, either because they hope to return to their old home or because they plan to emigrate to a third country.

Without saying so expressly, the author restricts his study to those displaced persons who, coming from Czechoslovakia, Hungary, Yugoslavia, Rumania, Poland, Lithuania, Esthonia, Latvia, or Italy, have emigrated to Germany. The same problem arises with

regard to many millions of men who, leaving Eastern Europe or Germany, Denmark, Belgium, or the Netherlands, go to England or some other part of the British Commonwealth, or to the United States of America, Palestine, France, etc. It is particularly regretable that the author has not dealt with the French problem, and has left out of account the statements made and the investigations undertaken by Niboyet and others (see Niboyet's *Traité*, Vol. 1 and 2). There is no essential difference between the German and the French problem.

The main question, the importance of which is fully recognised by the author, is : Should the test of nationality be maintained despite the intermixture of populations and the difficulties in many cases of ascertaining a person's nationality? Or should it be replaced by that of the person's habitual residence or that of his 'ethnical' character? The author, of course, rejects the ethnical test. To treat foreign nationals of German 'blood' or German 'descent', so-called *Volksdeutsche*, in private international law as if they were Germans—as was actually still done by a Berlin district court in 1947—savours of Nazism. But the author is equally opposed to the domicile or residence test, and considers that certain amendments to the nationality test would suffice to meet the case. Naturalisation should, he contends, no longer be regarded as an act of grace on the part of the State for the benefit of an alien, but as a measure undertaken by the State in its own interest, that is, in order to avoid the formation within its territory of small groups of nationals of other States. Nationality, so the author thinks, should cease to be a 'privilege clothed in a garb of patriotism', and should be treated as a 'cool and business-like purely formal concept'. It is difficult to see how this goal (if desirable) can be attained by an act of the legislature, and the author makes no concrete suggestions, nor does he even say what he means by a 'formal' concept.

That the test of domicile (not in the English or the German but in the French sense) or of habitual residence should be substituted for the nationality test is one of the most important recommendations that have been made in modern France to alleviate the present situation caused by mass immigration. It is due in particular to the energetic and well-considered efforts of Niboyet that the movement in favour of the domicile test has come to the fore. The problem has been fully discussed by the *Comité français de droit international privé*, Vol. 1, 1934, 21 *et seq.* No blame attaches to the author of the booklet under review for not having studied the French contributions; it may well be that they were unavailable to him owing to the inadequacy of libraries in post-war Germany.

The three arguments against the domicile test mentioned by the author are hardly convincing. First, 'uncertainty' of the place where the habitual residence (the domicile) lies. But is it more

difficult to find this than to ascertain a person's nationality if documents have been destroyed or otherwise lost? Secondly, variations in the meaning of the term 'domicile' (and, indeed, there are three different definitions of this term, the English, the French, and the German), which, according to the author, create difficulties in 'classification'. What difficulties? The author does not mention any. Thirdly, the danger that the choice of law might be influenced by private persons; the author thinks presumably of an artificial and *mala fide* creation of domicile, a danger which would be very real if the test for the personal law were sojourn or simple residence, but hardly where domicile or habitual residence is decisive.

The author regards the *Neubürger* problem as one of the so-called *Statutenwechsel*, *i.e.*, change in the connecting factor or point of contact. In many cases this view is correct. There are, however, cases where there is no such change. Hundreds of thousands of fugitives to Germany have retained their old (Polish, Hungarian, etc.) nationality, and as nationality is the test in Germany there is no change in the connecting factor. The difficulties which exist for such displaced persons concern the treatment of aliens.

The problems arising in the case of *Neubürger* are to a great extent cases not of international but of interlocal law. Thus, where a person residing in one German zone (*e.g.*, the Russian zone), settles in another German zone, or where a person before emigrating into Germany had resided in various parts of Yugoslavia successively (say, first in Dalmatia and then in Serbia). The author gives a useful list of the various legal sources in the States from which the emigrations have taken place, and of the various interlocal laws. Useful also is what he states on the consequences of any change in the applicable foreign law if the change was not made till after the emigration (pp. 78–82).

The little book deals with natural persons only. The *Neubürger* problem as it concerns legal persons will be discussed in a second part. Particular regard will presumably be paid to cases where a company's enterprise is transported from one country to another.

Martin Wolff.[1]

Vorkriegsverträge in Friedensverträgen. By Ernst Wolff. J. C. B. Mohr (Paul Siebeck). [Tübingen. 1949. 196 pp.]

In 1946 the eminent author published an English book on 'The Problem of Pre-War Contracts in Peace Treaties'. After his return to Germany, as President of the Supreme Court in the British zone, he wrote the German book here under review, which is based on his English work. The new book, while omitting such parts of the

[1] All Souls College, Oxford.

earlier publication as are of interest for English readers only, contains very valuable additions. In particular, the author has made use of the Peace Treaties concluded after the publication of the English book, in 1947, with Italy, Rumania, Bulgaria, Hungary, and Finland. His aim is to show the influence on international lawyers and tribunals of their experience in the application of the treaties of 1919 (Versailles, etc.) and 1923 (Lausanne), and thus indicate the tendencies of international law, and prepare the way for the future treaty with Germany by making concrete suggestions. No one could be better qualified for such work than Dr. Ernst Wolff, who, as former consultant lawyer of the German Agent's Office of the Mixed Arbitral Tribunals (establshed under the Treaty of Versailles) had an excellent opportunity of studying and even to a certain extent of influencing the practice of these tribunals.

The author's proposals—summarised as eighteen points (pp. 150–153)—are not based on general views, on vague considerations, on ' justice and equity ', or on subjective reflections, but on a careful study of legal experience in all countries concerned during the period between the two great wars. The author has thereby indicated the only acceptable way of arriving at sound propositions. His sources are the following : First, the Peace Treaties of 1919 and 1923; their importance for the future Peace Treaty is enhanced by the fact that most of the rules in the Versailles Treaty were repeated in the Peace Treaties of 1947. The second source is contained in these Peace Treaties themselves in so far as they embody new ideas with regard to pre-war debts. An essential alteration was the replacement of the Mixed Arbitral Tribunals by ' Conciliation Commissions ', whose task it is to achieve voluntary agreements where possible. If this fails, they exercise jurisdiction, just like a court of law, on all or nearly all disputes that may arise between the nations respectively concerned in the interpretation and application of the various treaties. They apply ' law ', except in so far as they determine procedural rules : in establishing such rules they must be guided by ' justice and equity '. (See on this the author's explanations, pp. 157–160.)

The third source is the practice of the Mixed Arbitral Tribunals. The Peace Treaties neither are nor purpose to be exhaustive; they refer several times to the municipal laws, and some doubts have arisen as to the relationship between these laws and the treaties themselves. In other respects, too, the Peace Treaties are not free from ambiguity. The Arbitral Tribunals have done much to illustrate the meaning of the text, to interpret it in a sound and reasonable way, and, in particular, to show the trend of international law. True, they have not always succeeded in full; despite their efforts they have left several controversies unsolved.

A fourth source (inferior to the first three) is found in the resolutions taken at the meetings in 1913, 1928, and 1930 of the International Law Association. Resolutions by a great international

congress of lawyers from many countries, though possibly not of major importance, may to a certain degree confirm the tendency of legal development.

The method by which on the first 150 pages the author's suggestions as to a future Peace Treaty with Germany are founded is admirable. As to the result, the summary of the eighteen points, the reviewer agrees with nearly all of them. Only the second paragraph of No. 5 seems open to doubt, not only because of its complicated form which makes understanding difficult, but also because its content is not unassailable. If for example a restrictive covenant has been concluded by parties who by the war become enemies, the outbreak of war dissolves the contract under the Versailles Treaty but not under one of the 1947 Treaties, since the execution of such a contract does not require intercourse between the enemies. According to the author's draft (if I understand it correctly) the covenant is to be maintained only if this was ' really intended '. By whom intended? By the parties at the time of concluding the covenant? Can such intention ever be proved or presumed? And is it useful to require such proof?

The highly controversial problem of the treatment of quasi-contractual obligations, notably of unjustified enrichment, has been solved satisfactorily: No. 14 of the summary. It is doubtful whether a duty to refund the amount of the enrichment can be derived from the Peace Treaty itself or whether it depends on the municipal law applicable to the contract. The Anglo-German Mixed Arbitral Tribunal was divided on this point. The author with new arguments proves the correctness of the second view: pp. 98–107.

Two small points may be noted on which the reviewer would not accept the author's opinion. The first concerns the nature of the (unilateral) offer which under German law is ' binding ' for the offerer. This effect is regarded by the author (pp. 60–61) as an ' obligation '. It must be doubted whether this view is tenable. The German ' *Bindung* ', ' *Gebundensein* ' does not mean ' creating a duty, an obligation '. It merely connotes irrevocability. The second point regards the seller's duty in the case of defects of the delivered goods. The author contends that in such case the seller has not fulfilled the warranty that the goods are free from defect (p. 69). This is undoubtedly correct where the goods sold are unascertained. But in the case of ascertained goods the seller, according to the now prevailing doctrine, has fully performed his contractual duty by delivering the goods even if they are defective.

A few words as to the conflict of laws on which the author touches slightly in various places. The Peace Treaties often refer to the applicable municipal law as opposed to the Peace Treaty itself. But they refrain from setting up rules on conflict of laws, leaving this to the tribunal. However, since the tribunal has no *lex fori* the tribunals themselves are bound to develop conflict rules. The

problem has been dealt with by Gutteridge and Lipstein, 7 *Cambridge L. J.* 80, and by Gutzwiller, 3 *Internation. Jahrbuch f. Schiedsgerichtswesen* (1931) 123 *et seq.* The author has wisely left these questions open.

Martin Wolff.

Mandates, Dependencies and Trusteeship. By H. Duncan Hall. [Washington : Carnegie Endowment for International Peace. London : Stevens & Sons, Ltd. 1948. xvi and 429 pp. 25s. net.]

Mr. Duncan Hall, who was a member of the Secretariat of the League of Nations, has written what will surely be a classical textbook on the Mandate System. For he has followed the development throughout from its creation to its dissolution, when the League of Nations itself came to an end, and bequeathed its assets and liabilities to the United Nations. The book has a fullness of knowledge, not only of the facts, but of the principles underlying the system. The first part, which gives a general view and an exposition of what is called ' the international frontier ', that is, the debatable lands between the Powers, was prepared as a study for the delegates to the San Francisco Conference ; and it influenced the discussions on the Trusteeship System.

The second part gives the background of the Mandate and Trusteeship System from 1919 to 1945, dealing particularly with the discussions at the Peace Conference after the First World War. Part 3 is a detailed examination of the working of the League system, with particular attention to the proceedings of the Permanent Mandates Commission. Part 4 deals with the end of the mandates and their final disposition, with an epilogue on the new Trusteeship System which is designed to take its place. The author had not a little foreboding about the way in which the new international supervision would work ; and the story of the proceedings of the Trusteeship Council since the book was finished has only too abundantly justified him.

The new idea which Duncan Hall has put in the forefront of the study is that international mandates and trusteeship are not in the main a product of the humanitarian idea and of liberal idealism in international relations, but ' are by-products of the working of the state system of the world, of the political relations of the powers, and thus factors in the balance of power '. The colonial mandates are but one aspect of the treatment of political frontier zones, which is expressed also in international territorial regimes, in the delimitation of spheres of interest, demilitarised areas, neutralised zones, buffer-States, minority treaties, etc. It was in the Mediterranean and the Middle East that the international

frontier most strongly concerned the Great Powers during the nineteenth century; and the mandate idea of 1919 had its prototypes in the mandate given to France for the Lebanon in 1860, and the international arrangement provided for Crete by the Concert of Europe in 1897. That direct continuity between the nineteenth century mandates and Article 22 of the Covenant of the League was most clearly manifest in the case of Palestine.

It is then an error to think that the mandate system was primarily concerned with the African Colonies, or the backward territories of Polynesia. It was indeed 'a strange assortment of territories which the backwash of the war against Germany and Turkey and the principle of no annexations flung together under the new system'. What was new in the Article of the Covenant was the establishment of international supervision over the administration of dependent countries. 'In the limited area international trusteeship was set up, alongside of national trusteeship.' That innovation was not applied to colonies and dependencies in general, but was limited to these particular territories which had been conquered. The experiment worked because the mandatory governments—with the exception of Japan—gave willing co-operation.

Nevertheless the experiment had only a limited success. Duncan Hall brings out clearly certain weaknesses. The supervision of a permanent mandates commission was essentially supplementary, because it was directed to Annual Reports submitted by governments which were examined nearly a year after the period to which they referred. The time-lag restricted the action of the League bodies. The role of the Commission 'tended to be of an Old Testament character. It was the Keeper of the Ten Commandments of Article 22 of the Covenant'. International supervision then was somewhat laggardly, negative and passive. It was the recognition of that fact that led the colonial Powers during the war to devise a new form of international co-operation with regard to their colonial territories, and to form regional councils, such as the Caribbean Commission, that were concerned with the positive and active development of the well-being of the population.

Duncan Hall criticises also some of the principles of the mandates which were not in accordance with the hard realities of our time, or with the broader trends of international development. Thus, underlying Article 22 was the assumption of independent national sovereignty for mandates, and opposition to the close association of the dependent territory with the mandatory country. That idea runs contrary to the modern trend of integration of the colony as a self-governing unit within the larger State. Again, the prohibition in the mandates of the raising of defence forces and of fortification, with an idea that the mandated territories could be isolated from the operations of war, proved to be a complete illusion when the test came. The territories indeed became not only in the Middle East but also in Polynesia, pivotal points in the great struggle.

The author does not refer to a remarkable irony which appeared in the last report sent by the Governor of the mandated territory of New Guinea to the Secretariat of the League. Writing in 1940, he observed that the primitive natives, who had once been under German rule, realised that a war was being waged between the ruling power and their former ruler. But they conceived it, he said, as a fight with bows and arrows and stones. It would be the function of the mandatory administration to keep them in that happy state of innocence. A few months after that report was written, New Guinea had become one of the fiercest battle grounds between the Japanese and the Allies, and the native villages were bombed to pieces.

The account given of the working of the Permanent Mandates Commission and of the Assembly of the League in relation to the Trusts is detailed and illuminating. We have the fullest description that has yet been given of the procedure in dealing with petitions, which played an important part in the system. Equally full is the account of application of international conventions to the mandated territories. The transition from mandates to international trusteeship at the end of the Second World War is also most carefully expounded. But in the last part of the book the author inevitably is less comprehensive. He no longer has personal contact with the workings of the international supervision. His account of Palestine and Syria during the war is brief, and he does not cover the final decisions of the United Nations relating to the creation of a Jewish State and an Arab State. He has a fuller appreciation of the effect of war on the Pacific Mandate over New Guinea, where the war brought about administrative unity with the territory of Papua. The war too made it clear that for Australia the mandated territory was a vital strategical base in the defence of the Continent. On the fate of the group of islands which were under Japanese Mandate he is strangely silent.

The mandate machinery of the League could not function from 1939, although reports were sent by the British Mandatories to the Secretariat till 1941. But when the final Assembly of the League was held in 1946, in order to arrange for the transfer of its functions, activities and assets to the new world body, the United Nations, there was an intestacy with regard to the mandates. No attempt was made to transfer sovereignty to the United Nations; and the mandatories were left in undisputed occupation of the territories. Owing also to the rejection by the first General Assembly of the proposal of the Preparatory Commission to establish a Provisional Trusteeship Council, there was a gap between the supervision of the League and the supervision of the United Nations over the former mandates.

In his final reflections, Duncan Hall emphasises the contrast between the atmosphere in which the mandates of the League and the trusteeships of the United Nations were brought into being.

'The Trusteeship System was finally launched with the legal basis of the Agreements challenged by some Great Powers, and in an atmosphere of political transition and profound ideological division. It was launched, not like the mandates into the quiet waters of a non-governmental body—that debated in private, eschewed politics in the main, and worked closely with the mandatory governments on the practical policy of welfare,—but into the midstream of world politics and the turbulent waters of the world frontier'. It may be hoped that the author will give us later as thorough a study of the working of the Trusteeship System in its initial period. In his last sentences he expresses the doubt whether United Nations trusteeship and the obligations assumed by the Powers to the dependent peoples are to be a lamp to light forward the way of dependent peoples, or '. . . a torch-flame turned by the wind back upon its bearer's hand . . .'.

The book contains a number of annexes which are valuable because they are not elsewhere easily available to the student of international affairs; the text of A, B and C mandates, the rules of procedure of the Permanent Mandates Commission, and the rules in respect of petitions; the text of the Trusteeship Agreements approved by the General Assembly in December, 1946 and November, 1947; the Trusteeship Agreement concerning the former Japanese mandated islands, approved by the Security Council, and finally, the Rules of Procedure for the Trusteeship Council. The quotations in this review will give the reader some idea of the epigrammatic, and sometimes dramatic, writing, so that a technical subject is infused with life.

Norman Bentwich.[1]

Les Nations Unies et Les Refugies. By Roger Nathan Chapotot. Préface de Hans Wehberg. [Paris: Editions A. Padone. 1949. 292 pp.]

The law and practice of the international treatment of refugees are a fertile source of doctorate theses. This study, prepared by a graduate of the University Institute of International Studies at Geneva for his doctorate, is an original contribution which deals rather with the political and social than with the legal aspects of the problem. It is a very thorough piece of work, both in its historical analysis of the refugee problem from the days of the Roman Empire to the present day, and in its psychological analysis of the conflict between the totalitarian States of the Eastern bloc and the Western democracies, in regard to the refugees from Eastern Europe. As Professor Wehberg observes in an introductory

[1] Professor of International Relations in the University of Jerusalem.

note, the author has made a searching study of the *travaux préparatoires*, which led to the conclusion of the statutes of the International Refugee Organisation.

The broad theme is a ' study of qualifications ', which the author thus explains : ' In protecting certain men the states of refuge must not injure the states of origin; and vice versa, in order not to endanger peace, the state of origin must consent to these persons being aided by the states of refuge. That involves that the states of refuge and the states of origin come to an understanding about the persons to be helped, about their qualifications, and about the method of the help. That is a *conflict of qualifications*; that is the object of our study '. The word ' qualification ' is used in a different sense from that with which private international law is concerned. The significance here is a conflict of policies, ideologies and propaganda.

With almost excessive meticulousness, the author expounds and discusses the differences of view that were expressed in the United Nations Conferences at London and Geneva about the definition of refugees. He leads up to the conclusion that there must be a ' democratic ' solution; and by democratic he means a solution in which there is agreement to differ. The totalitarian States must allow the others to give asylum and refuge to their former citizens who, holding different political opinions, have fled and will not return; even though, according to their own ideology, they regard them as traitors to the State. He has naïve belief in logical necessity. ' Since the problem of refugees has become a normal incident of international life, since the states of refuge must bring a solution which is definite, immediate and unequivocal, since there must be a control satisfactory both to the states of origin and the states of refuge, since these states are incapable themselves of bringing such a solution, it follows that there must be established a specialised and permanent international organ '. The present International Refugee Organisation, which was expressly designed to be temporary, and which does not include representatives of the States of origin, does not satisfy these logical conditions. So we must move to something superior. The States of origin should, according to our idealistic author, find a common ground with the States of refuge in treating the refugees as men, as human beings. The States of refuge on their side must apply to the refugees the principles of their humanist and Christian tradition, and extend to them the full dignity of man. He realises that to this end there must be a bare minimum of confidence between the two groups of States. For without this, there would be a failure to recognise the fundamental needs of the community; and sooner or later, all the fatal consequences of a divorce between ethics and power would be unloosed.

It will be realised that the writer brings a genuine fervour and missionary spirit to his study. His book is not easy reading because

the style is overloaded with parentheses and interpolated observations. But the study is made with care as well as with conviction.

Norman Bentwich.

The Law and Custom of the Sea. By Herbert A. Smith. Under the auspices of the London Institute of World Affairs. [London : Stevens & Sons, Ltd. 1948. 193 pp. 12s. 6d.]

Professor Smith, now retired from the Faculty of the University of London, has condensed into a few pages an informing statement of the British view of the present state of the law of the sea in peace and in war. The theme of the study is control. The book is designed for naval and merchant marine officers sailing under the British flag, and has emerged from lectures given over the years before the Royal Naval War College and the Royal Naval Staff College. How are the waters of the globe divided for purposes of sovereignty and control, and what are the rules of control? What can a British commander assert in the way of control over ships which he meets, and what can a foreign flag commander seek to assert as to a British master and ship? The illustrations and quotations are drawn almost entirely from English sources; the influence of a French author, Professor Gilbert Gidel,[1] is freely acknowledged, but otherwise there are scant traces of non-English authorities. The Preface states that this is ' a practical guide for those serving at sea, whether in the Royal Navy or in the Merchant Service ', that historical discussion has been cut down to the ' barest minimum ', that citation of cases is avoided. The author's own authority gives the book importance.

The description of the laws and customs of peace occupy about one-third of the book, and this section is divided between internal (or as the Americans are more apt to say inland) waters, territorial waters—being the marginal three-mile or other belt, and the high seas. The double-radius system of drawing the base line of ' internal ' waters across a bay is strongly advocated (p. 6); if the three-mile belt is adopted this results of course in a line at the outermost point where the throat is not exceeding six miles wide. It is indeed the least controversial method of establishing a base line on the drawing board, to which the outer or territorial belt line shall be parallel. The ten-mile throat line is thus condemned; and there seems to be no credit given to the double-radius method applied to the six-mile belt, which gives a twelve-mile throat, or the Russian twelve-mile belt, which gives a double radius of twenty-four miles. Drawing-board lines of course do not always furnish boundaries which are in accord with the facts and necessities of

[1] Gidel, *Le Droit International Public de la Mer*, Vol. 3. Paris, 1932–34.

seafaring life at various points; and there are many instances of division lines drawn by government fiat. Norway has drawn its lines between outer points, islands and rocks, and the line across the vital Vestfjord is forty miles; Canada claims to control Hudson Bay, whose entrance is fifty miles across. These claims are said to be 'impossible' (p. 5) or 'doubtful' (p. 11), but there is no citation to support the condemnation. The Chilean control of the Strait of Magellan, and United States control of Chesapeake Bay (whose entrance is fifteen miles wide) are politely given validity because 'historical' (p. 10). The United States boundary between inland waters and the high seas [2] leaps long distances from rock to buoy at many points; the 'continental shelf' control of land under water and of fisheries has been proclaimed by the Executive.[3] The salmon fisheries of Bristol Bay on the coasts of Alaska cannot be protected under the three-mile rule; wider controls must be asserted. It seems hasty to say that the Vestfjord and Hudson Bay situations are impossible and cannot be recognised.

Professor Smith sometimes indicates that he does not wholly agree with some of the existing British views and rules. He thinks the three-mile limit too narrow (pp. 16–18) and hints at regret that official policy has given up the Bristol Channel as an interior British waterway (p. 11). The whole of that Channel was once of the 'King's Chambers', with a 100-mile line from Milford to the Lizard [4]; now it is the high seas, with a three-mile marginal belt until the double-radius rule achieves a six-mile crossing in the estuary of the Severn. Such comments are often brief and tantalising because they suggest so much that remains unsaid. Being a guide for British, it is not always a sure guide for those who sail under other flags. But it is extremely important for masters of all vessels to know the rules and views that guide British officers. Hence this volume should be studied by every naval and merchant marine officer.

Some matters not discussed are the wide neutrality zone laid far at sea around all the Americas by the Pan-American States in 1939 [5] which has significance both in peace and war as the area which the Americas undertake to patrol; and the incident of the *Admiral Graf Spee* and *The Tacoma* at Montevideo whither the three smaller British warships had driven them.[6] The 'continental shelf' doctrine is growing in importance; the Washington proclamations of 1945 as to fisheries and lands under water [7] have been copied

[2] U.S. boundaries of the high seas: Act of Feb. 19, 1895, s. 2; now found in 33 U.S. Code 151. See *Griffin on Collision* (1949), p. 685.
[3] Executive Orders 9633 and 9634 of Sept. 28, 1945; texts at 1945 Amer.Mar. Cases 1365, 1369.
[4] Meyer, *Extent of Jurisdiction in Coastal Waters*, 1926–1937, Leiden, p. 9.
[5] Pan-American Conference, October 2, 1939.
[6] December 13–17, 1939.
[7] See Note 3.

in various forms by Mexico, the Persian Gulf States, and others.[8] The Territory of Alaska has enacted an income tax law which attempts to reach the wages of seamen earned while their vessels are moored to Alaskan wharves and also while navigating in waters over the continental shelf.[9] All fishing enterprises which operate in waters of less than 100 fathoms might find themselves taxed under that doctrine. The events of these days seem to pose more problems than can be answered by the three-mile belt and the six-mile rule for bays. Certainly the coastal State which espouses an oil-drilling platform fifteen or twenty miles off-shore will not consent to free navigation by foreign vessels as though the platform—which may represent an investment of over a million dollars—were not there.

The time seems to have come when it must be said honestly that no one rule or policy fits all the coasts, bays, shallows and deeps and industrial developments of this globe. Nor does any one rule of sovereignty now fit the various uses to which the sea is put. The effort to control whaling is an example; what should any naval commander do when he finds a vessel violating the Whaling Convention [10]—whether or not she flies a flag of a ratifying State? Will the important group of ratifying States soon assert that one who raids the whale fisheries in defiance of the agreed rules of conservation is some sort of a pirate? Groups to control fisheries are forming rapidly under the aegis of the United Nations; the Indo-Pacific Fisheries Conference [11] has begun to function, and there will be others. The three-mile limit may soon have significance only for local crimes and passing navigation. The naval officer of today and tomorrow would seem to have need of a wider-ranging set of instructions as to the laws and customs of the sea.

The decision of the International Court of Justice in the *Corfu Channel Case*,[12] to the effect that there is an international right of innocent free passage for both merchant vessels and warships through a strait less than three miles wide between coasts of different sovereignties and connecting two seas, is extremely important in this field. Professor Smith is certain that merchant vessels have such a right; but was unwilling to predict that the court would grant the same right to ships of war (p. 35), although this was, of course, the British argument at the time the volume was prepared.

The inclusion of the Declaration of London of 1909 is very useful. The high degree of accuracy in the citation of materials

[8] Amer.J.Int.Law, Vol. 43, p. 530 (July, 1949); also Amer.J.Int.Law, Official Documents, Vol. 43, supp., p. 154.

[9] Alaska Laws of 1949, Nos. 3 and 115, Jan. 22 and 27, 1949. See *Alaska S.S. Co.* v. *Mullaney*, Collector of Taxes, 84 F., Supp. 114.

[10] Whaling Convention, 1931, with several supplements. USTS 880. Texts: *Benedict on Admiralty* (6th ed., 1940), Vol. 6, p. 327.

[11] Indo-Pacific Fisheries Council (FAO of UN), Nov. 9, 1948. USTOIA, 1895. Text: 1949 Amer.Mar.Cas. (Sept.).

[12] *Corfu Channel Case*, I.C.J. Reports, 1949, p. 4. 1949 Amer.Mar.Cases 1239 (with chart); 43 Amer.J.Int.Law 558.

is marred by one easy error; at page 59 it is stated that the Collision Convention of 1910 promulgated the Rules for the Prevention of Collision. Those Rules were of course agreed upon at the Washington Conference of 1889 and are cast in the form of parallel and simultaneously effective legislation, generally effective since 1897. The Collision Convention of 1910 (which is the Maritime Conventions Act of 1911 in Great Britain) deals with the principles on which damages caused by collision are assessed.

Professor Smith's *Law and Custom of the Sea* will be studied and treasured by many men who go to sea both for its rich content and its handy format. The importance of British doctrine and the high authority of the author give it unusual importance.

ARNOLD W. KNAUTH.[13]

Cases on Conflict of Laws. By R. H. GRAVESON. [London: Stevens & Sons, Ltd. 1949. pp. xx and 659. £2.]

THE legal case-book is still a relatively rare phenomenon in England. In the United States, on the other hand, the case-book has been developed to a very high degree. In the field of Conflict of Laws there are, in the United States, at least three case-books which are in relatively common use in university law schools. The need for such books there is immediately apparent. With forty-eight State jurisdictions, and an enormous collection of federal reports, the task of the student without a case-book would be almost impossible and quite unbearable. In this country, we are not so hard pressed. But the pressure on reports is heavy enough to make what Professor Graveson felicitously calls the case for case-books a very strong one.

There is, in many places in this country, a prejudice against the case-book. It has been suggested by some that it is necessary for the law student to go direct to the reports. It is said that if he relies on the selection of the case-book editor, the student loses the spirit of inquiry which comes from going to the original sources. Also, it is said, there is always the possibility of error. The editor of the case-book may omit passages which, in his view, are not important. He may be wrong, and the student does not correct the error by recourse to the reports. In the opinion of this reviewer such objections are not serious. If—as Professor Graveson has wisely done, apparently against the wishes of his publishers—headnotes are omitted, so that the student must find the principle of the case for himself, there can be no serious suggestion that self-reliance is taken from the student. Nor is it believed that the danger of "cutting" a report is of much significance.

There is another overwhelming point in favour of the case-book. Oxford law libraries—to take the example with which the

[13] Of the New York Bar and New York University Law School.

reviewer is most familiar—reveal the most fantastic duplications and omissions. In the first place, there is the duplication of set after set of English reports in university and college libraries. Because there are so few case-books, there must be so many sets of reports at which students may work constantly. The expenditure is tremendous and leaves nothing, or practically nothing, for the provision of full sets of Empire and American reports, and for the provision of as full a collection as possible of current legal periodicals. The result is that Oxford possesses a law library which very many American institutions would be ashamed to provide for their members. And it is almost too obvious to remark that an institution with such defective facilities places heavy and altogether unreasonable burdens on the researcher, who should justifiably expect of a great English university the facilities which are available in at least three places within the single city of Chicago.

It may be said that the preparation of good case-books—and Professor Graveson's book is a good case-book—could put an end to this senseless, extravagant duplication of English reports and materials. With the resources thus made free, it would be within the bounds of practical possibility (if dollar funds allow) to build up an adequate central law library. At least, while dollars are so rare, there would still be an opportunity for filling up the yawning caverns where full sets of Commonwealth and Empire reports should be.

Professor Graveson's case-book is the second in recent years to appear in the field of Conflict of Laws. The first was done by Mr. Morris and appeared ten years ago. That was an excellent and scholarly piece of work, though as a working case-book it covered too few cases. In any event, it is ten years old, and in that period there have been enormous developments in this field. Professor Graveson's book is remarkably complete, and it is most impressive to see how he has covered the field, and how good his judgment has been in deciding where and where not to cut a report. There are one or two cases which this reviewer might have chosen rather than the one chosen by the editor, but that is inevitable, and certainly reflects no criticism. The section on tangible movables is a little thin, but this difficult subject has not received much judicial attention.

There are some minor criticisms. In one or two of the brief notes which Professor Graveson adds to his cases there might be greater clarity. For example, his reference to *Re Cutcliffe's Will Trusts*, which he compares with *Re Berchtold* on the point of classification, is not too clear. The point in the *Cutcliffe Case* was that the statute said that the stock was to be treated as *land*. Perhaps the italicisation of the word land on p. 30 might make the point a little clearer. It certainly needs clarification, for the case has confused a scholar as well-informed as Falconbridge. On p. 76, *Re O'Keefe*, a case which is no good advertisement for the friends

of renvoi, is cited. It might be worth while for the editor to add a word of doubt if, as this reviewer hopes, Professor Graveson has doubt about that decision.

What Professor Graveson might well add to a future edition of his case-book is a set of references to articles, case notes, etc., which bear on the cases he is treating. He might study such an American case-book as Cheetham, Dowling, Goodrich and Griswold, *Cases and Materials on the Conflict of Laws*, with profit. In that book, the cases have notes attached indicating where comment on the decisions may be found, and these articles and notes are admirably indexed in the front of the book. Professor Graveson cites only one article on evasion of the law (on pp. 157–8), which is by himself, and only one case note (p. 629) on *Syal* v. *Heyward*, again by himself.

However, these small criticisms do not detract from a fine achievement. Those who espouse the case for case-books have strong support and example for their case in Graveson's *Cases on Conflict of Laws*.

ZELMAN COWEN.

The Year Book of World Affairs. Vol. 3, 1949. Edited by G. W. KEETON and GEORG SCHWARZENBERGER. Published under the auspices of the London Institute of World Affairs. [London : Stevens & Sons, Ltd. 1949. 342 pp. 20s.]

IT is somewhat difficult at first sight to see what precise purpose this publication is meant to serve, and its varied contents are of very unequal interest and merit. The editors do not seem to have been quite certain whether their object is to chronicle current international history—a task the more useful in view of the delays in restarting the Chatham House survey—or to provide informed commentary on specific and topical questions.

The series of articles that come under the former heading include useful ones by Mr. David Thomson on 'The Middle Way in France', dealing with political developments in that country from the autumn of 1946 to the early part of 1948, and from Mr. Hugh Seton-Watson on developments in the 'Popular Democracies' up to the time roughly of the Czechoslovak coup of 1948. On the other hand, the Rev. A. McLeish's 'India—Since Independence Day', is not a little naïf in its approach, and Mr. W. Lewisohn's 'Basic Problems in Modern China', while making some useful points, does little to illuminate the situation now existing, since the rapidity of the Communist conquest was totally unforeseen by him when he wrote. Professor M. M. Ball's article on 'Recent Developments in Inter-American Relations' is a useful compendium of the institutions and treaties now binding the American Republic but hardly touches on the political and economic realities underlying the imposing paper structure.

Of the articles on specific points, three are almost exclusively factual: Mr. L. C. Green's on the 'Little Assembly', Mr. E. Hambro's on 'The International Court of Justice', and Mr. L. B. Schapiro's on 'Soviet Participation in International Institutions'. The last of these is of particular usefulness for purposes of reference. On the other hand, Miss Susan Strange, in her article 'Palestine and the United Nations', tackles a very vexed piece of contemporary history in her endeavour to explain how the United Nations came to pass its 'partition' resolution without providing the force that could alone have secured its effectiveness without war. Although this is by no means a definitive piece of work, it does breathe a healthy realism which is at any rate refreshing.

Dr. J. Daniel's article on 'Conflict of Sovereignties in the Antarctic' is not merely the most learned contribution to the current volume, but the only one which attempts a positive conclusion. He argues most powerfully for the abandonment of the fiction of national sovereignties over uninhabitable ice-bound wastes, and for assimilating their status to that of international oceans.

The first two pieces in the book fit into neither category: Dr. Schwarzenberger discusses the content of international relations as an academic discipline, and some of the general problems involved in its study. Dr. L. Haden Guest's essay on 'The Future of the British Colonial Empire' might have done quite well as a 'pep-talk' to a Labour summer school, but its superficiality makes it quite inappropriate for inclusion in a volume of this kind. A large number of books are also reviewed at varying length, by a small number of reviewers.

If the *Year Book of World Affairs* is to carve out an accepted place for itself, there will have to be some harder thinking as to its intended role than seems to have gone into it so far.

Max Beloff.[1]

[1] Reader in the Comparative Study of Institutions, University of Oxford; Fellow of Nuffield College, Oxford.

LIST OF DOCUMENTS

The following list of documents, agreements and statutory instruments published during 1949 has been prepared by Mr. F. A. Vallat. It is proposed in each issue of the *Quarterly* to publish lists of such documents as may properly fall within the purview of international lawyers.

I. Documents and Agreements

Title	Number (1949)	Date of Instrument	Reference
Agreement between His Majesty in respect of the United Kingdom and His Imperial Majesty the Emperor of Ethiopia for the Regulation of Mutual Relations.	Treaty Series No. 38	December 14, 1944	Cmd. 7722
Agreement between the Governments of Great Britain and Northern Ireland, of the French Republic, of the Netherlands and of the United States of America.	Treaty Series No. 27	October 30, 1946	Cmd. 7679
Agreement for Preservation or Restoration of Industrial Property Rights affected by the Second World War.	Treaty Series No. 54	February 8, 1947	Cmd. 7784
Universal Postal Convention.	Treaty Series No. 57	July 5, 1947	Cmd. 7794
Agreement concerning Insured Letters and Boxes.	Treaty Series No. 58	July 5, 1947	Cmd. 7795
International Convention on Privileges and Immunities for the Specialised Agencies of the United Nations adopted by the General Assembly of the United Nations on November 21.	United Nations No. 3	1949	Cmd. 7673
Agreement between the Government of the United Kingdom and the Royal Danish Government making Further Provision for the Supply of certain Aircraft and Equipment to Denmark.	Treaty Series No. 20	March 4, 1948	Cmd. 7660

Title	Number (1949)	Date of Instrument	Reference
Final Act of the Second Session of the Committee of European Economic Co-operation, together with the Convention, Annex and Supplementary Protocols Nos. I and II.	Treaty Series No. 59	April 16, 1948	Cmd. 7796
Protocol modifying the International Convention relating to Exhibitions of November 22, 1928.	Misc. No. 12	May 10, 1948	Cmd. 7736
International Convention revising the Berne Convention for the Protection of Literary and Artistic Works.	Misc. No. 15	June 26, 1948	Cmd. 7815
Agreement on Most-Favoured-Nations Treatment for areas of Western Germany under Military Occupation.	Treaty Series No. 17	September 14, 1948	Cmd. 7643
Exchange of Notes between His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland and the Government of the Chinese Republic for the Prevention of Smuggling between Hong Kong and Chinese Ports.	Treaty Series No. 9	January 12, and October 18, 1948	Cmd. 7615
International Rice Commission Constitution approved by the Conference of the Food and Agriculture Organisation of the United Nations.	Misc. No. 1	November, 1948	Cmd. 7611
Protocol bringing under International Control Drugs outside the scope of the Convention of July 13, 1931, for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs as amended by the Protocol of December 11, 1946.	Misc. No. 5	November 19, 1948	Cmd. 7671
Report on the Proceedings of the First Part of the Third Session of the General Assembly of the United Nations held at Paris September 21–December 11, 1948.	United Nations No. 1	September 21–December 11, 1948	Cmd. 7630

Title	Number (1949)	Date of Instrument	Reference
Report on the Proceedings of the Second Part of the Third Session of the General Assembly of the United Nations held in New York April 5–May 18, 1949.	United Nations No. 4		Cmd. 7752
Universal Declaration of Human Rights approved by the General Assembly of the United Nations.	United Nations No. 2	December 10, 1948	Cmd. 7662
International Labour Conference. Proposed Action by H.M. Government in the United Kingdom of Great Britain and Northern Ireland on the Convention concerning Workmen's Compensation for Accidents.		January, 1949	Cmd. 7626
Exchange of Notes between the Government of the United Kingdom and the Netherlands Government relating to the Release of Netherlands Money and Property held by the United Kingdom Custodian of Enemy Property.	Treaty Series No. 18	November 24, 1948–January 17, 1949	Cmd. 7644
Agreement between the Government of the United Kingdom and the Government of the Turkish Republic to establish Drawing Rights in favour of Turkey for the purpose of the European Payments Agreement of October 16, 1948.	United Nations No. 4		Cmd. 7752
Loan Agreement (Supplementary to the Agreement concluded on October 26, 1948) between the Government of the United Kingdom and the Export-Import Bank of Washington, dated February 16, 1949, together with the Text of the Promissory Note and a letter of Notification dated January 28, 1949, addressed by the Economic Co-operation Administrator to H.M. Ambassador at Washington.		February, 1949	Cmd. 7636

Title	Number (1949)	Date of Instrument	Reference
International Labour Conference, 31st Session, San Francisco, June 17–July 10, 1948. Report by the Delegates of H.M. Government in the United Kingdom of Great Britain and Northern Ireland.		February, 1949	Cmd. 7638
Exchange of Notes between His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of Brazil prolonging the Trade and Payments Agreement of May 21, 1948.	Treaty Series No. 39	February 3, 1949	Cmd. 7730
International Northwest Atlantic Fisheries Conference Final Act and Convention. Washington.	Misc. No. 4	February 8, 1949	Cmd. 7658
Consular Convention between His Majesty's Government in respect of the United Kingdom of Great Britain and Northern Ireland and the President of the United States of America.	United States No. 1	Feburary 16, 1949	Cmd. 7642
International Convention for the Permanent Control of Outbreak Areas of the Red Locust.	Misc. No. 2	February 22, 1949	Cmd. 7650
Agreement between the Governments of the United Kingdom, Norway and Sweden relating to a Joint Ocean Weather Station in the North Atlantic.	Treaty Series No. 29	February 28, 1949	Cmd. 7688
The Third Session of the General Conference of the United Nations Educational Scientific and Cultural Organisation. The Report of the United Kingdom Delegation to the Minister of Education.		March, 1949	Cmd. 7661

Title	Number (1949)	Date of Instrument	Reference
Exchange of Notes further prolonging the Monetary Agreement of November 1, 1945, between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czechoslovak Republic.	Treaty Series No. 22	February 28–March 2, 1949	Cmd. 7667
Exchange of Notes between His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland and the Swiss Government prolonging the Monetary Agreement of March 12, 1946.	Treaty Series No. 23	February 25–March 3, 1949	Cmd. 7669
Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czechoslovak Republic for the Mutual Upkeep of War Graves.	Treaty Series No. 31	March 3, 1949	Cmd. 7691
Exchange of Notes amending the Agreement of September 22, 1948, between the Governments of the United Kingdom and the United States of America for the Establishment of the United States Educational Commission in the United Kingdom.	Treaty Series No. 21	February 25–March 5, 1949	Cmd. 7666
Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Argentine Government for the Avoidance of Double Taxation on Income derived from Sea and Air Transport.	Treaty Series No. 37	March 14, 1949	Cmd. 7721
Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Greece, modifying the Agreement of November 26, 1945, regarding Air Services in Europe.	Treaty Series No. 26	March 21, 1949	Cmd. 7678
International Wheat Agreement.	Misc. No. 6	March 23, 1949	Cmd. 7680

Title	Number (1949)	Date of Instrument	Reference
Convention between His Majesty in respect of the United Kingdom of Great Britain and Northern Ireland and His Majesty the King of Sweden for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income.	Sweden No. 1	March 30, 1949	Cmd. 7670
Monetary Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Royal Norwegian Government Supplementary to the Monetary Agreement of November 8, 1945.	Treaty Series No. 24	March 31, 1949	Cmd. 7672
Financial Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Egyptian Government.	Treaty Series No. 35	March 31, 1949	Cmd. 7675
Supplementary Protocol No. 2 amending the Intra-European Payments and Compensations Agreement of October 16, 1948.	Misc. No. 8	March 31, 1949	Cmd. 7693
Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America prolonging the Bizonal Fusion Agreement of December 2, 1946, as amended by the Agreement of December 17, 1947.	Treaty Series No. 41	March 31, 1949	Cmd. 7742
North Atlantic Treaty.	Treaty Series No. 56	April 4, 1949	Cmd. 7789
Exchange of Notes between His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland and the Spanish Government, prolonging the Trade and Payments Agreement of June 23, 1948.	Treaty Series No. 30	April 6, 1949	Cmd. 7689

Title	Number (1949)	Date of Instrument	Reference
Memorandum on the Measures agreed by the United Kingdom, United States and French Foreign Ministers on the Programme for Germany.	Germany No. 1	April 6–8, 1949	Cmd. 7677
Exchange of Notes between His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland and the Portuguese Government further prolonging the Monetary Agreement of April 16, 1946.	Treaty Series No. 34	April 14, 1949	Cmd. 7713
Exchange of Notes between His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland and the Egyptian Government establishing Equality of Treatment in regard to War Damage Compensation.	Treaty Series No. 35	April 6–17, 1949	Cmd. 7710
Agreement between the Governments of the United Kingdom of Great Britain and Northern Ireland, Belgium, France, Luxembourg, the Netherlands and the United States of America for the Establishment of an International Authority for the Ruhr.	Treaty Series No. 28	April 28, 1949	Cmd. 7685
Agreement further amending the Monetary Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Swedish Government, dated March 6, 1945.	Treaty Series No. 33	April 29, 1949	Cmd. 7694
Exchange of Notes further prolonging the Monetary Agreement of November 1, 1945, between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czechoslovak Republic.	Treaty Series No. 36	April 27–30, 1949	Cmd. 7719

Title	Number (1949)	Date of Instrument	Reference
Exchanges of Notes deleting Newfoundland from the List of Territories covered by the Visa Abolition Agreements between His Majesty's Government in the United Kingdom and the Danish, Icelandic, Italian, Luxembourg, Norwegian, Swedish and Swiss Governments.	Treaty Series No. 49	April 25–30, 1949	Cmd. 7750
International Labour Conference. Proposed action by H.M. Government in the United Kingdom of Great Britain and Northern Ireland on the Convention and Recommendation concerning the Organisation of Employment Service.		May, 1949	Cmd. 7703
Statute of the Council of Europe.	Misc. No. 7. Treaty Series No. 51	May 5, 1949	Cmd. 7686 Cmd. 7778
Events leading up to the Signature of the North Atlantic Treaty with a commentary on the Text.	Misc. No. 9	May 11, 1949	Cmd. 7692
Exchange of Notes between the Government of Great Britain and Northern Ireland and the Government of the French Republic regarding the Exclusion of the French Somali Coast from the Franc Area as defined in the Anglo-French Financial Agreement of March 27, 1945.	Treaty Series No. 40	April 12–May 17, 1949	Cmd. 7731
Exchange of Notes between the Government of the United Kingdom and the Government of the Philippine Republic for the Reciprocal Exemption from Stamp Duty of Leases, etc., in respect of property occupied for diplomatic purposes.	Treaty Series No. 42	May 21–24, 1949	Cmd. 7744
Agreement on Social Security between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic.	Treaty Series No. 19	June 11, 1948	Cmd. 7651

Title	Number (1949)	Date of Instrument	Reference
Report on the Proceedings of the Sixth Session of the Council of Foreign Ministers.	Misc. No. 11	May 23–June 20, 1949	Cmd. 7729
Charter of the Allied High Commission for Germany.	Germany No. 2	June 20, 1949	Cmd. 7727
Explanatory Note on the Provisions of the Statute of the Council of Europe.	Misc. No. 10	June 21, 1949	Cmd. 7720
Agreement on Trade and Payments between the Government of the United Kingdom of Great Britain and Northern Ireland and the Argentine Government.	Argentina No. 1	June 27, 1949	Cmd. 7735
Exchange of Notes constituting an Agreement between H.M. Government in the United Kingdom of Great Britain and Northern Ireland and the Greek Government establishing additional drawing rights in favour of Greece for the purpose of the European Payments Agreement of October 16, 1948.	Treaty Series No. 64	June 29, 1949	Cmd. 7802
Protocol between the Governments of the United Kingdom, the United States of America and the French Republic and the Polish Republic relating to the Restitution to Poland of Monetary Gold looted by Germany.	Treaty Series No. 44	July 6, 1949	Cmd. 7749
Exchange of Notes between H.M. Government in the United Kingdom and the Italian Government prolonging the Sterling Payments Agreement of November 26, 1948.	Treaty Series No. 50	Rome, June 28, London, July 13, 1949	Cmd. 7775
Ceylon. Exchange of Letters between the Economic Secretary to the Treasury and the Finance Minister of Ceylon regarding the extended application of the Letters dated April 30, 1948, concerning Ceylon's Sterling Assets and Monetary Co-operation between the two Governments.		August, 1949	Cmd. 7766

Title	Number (1949)	Date of Instrument	Reference
India. Exchange of Letters between the President of the Board of Trade and the High Commissioner for India regarding the extended application of the Financial Agreement of August 14, 1947.		August 1, 1949	Cmd. 7760
Exchange of Notes between His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of Brazil, constituting a Trade Agreement.	Treaty Series No. 48	August 3, 1949	Cmd. 7768
Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czechoslovak Republic, further prolonging the Monetary Agreement of November 1, 1945.	Treaty Series No. 49	July 4–August 4, 1949	Cmd. 7772
Pakistan. Exchange of Letters between the Economic Secretary to the Treasury and the Finance Minister of Pakistan regarding the extended application of the Financial Agreement of August 14, 1947.		August 5, 1949	Cmd. 7765
Agreement between the Government of the United Kingdom and the Government of Denmark relating to Trade and Commerce.	Denmark No. 1	August 13, 1949	Cmd. 7786
Statement on behalf of the Military Governors of France, the United Kingdom and the United States of America regarding the Tariff of the Western Zones of Germany and Memorandum of Understanding relative to the Application to the Western Sectors of Berlin of the Agreement on Most-Favoured-Nation Treatment for Areas of Western Germany under Military Occupation.		August 13, 1949	Cmd. 7790

Title	Number (1949)	Date of Instrument	Reference
Sterling Payments Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czechoslovak Republic.	Treaty Series No. 52	August 18, 1949	Cmd. 7781
Protocol for the Prolongation of the International Agreement regarding the Regulation of Production and Marketing of Sugar, signed in London on May 6, 1937.	Treaty Series No. 68	August 31, 1949	Cmd. 7817
Tripartite Economic Discussions held in Washington, September 7–12, 1949, between Representatives of the United States, the United Kingdom, and Canada. Joint Communique issued on September 12, 1949.		September, 1949	Cmd. 7788
Exchange of Notes between His Majesty's Government in the United Kingdom and the Government of the Netherlands, further extending the Anglo-Netherlands Monetary Agreement of September 7, 1945.	Treaty Series No. 66	September 6, 1949	Cmd. 7806
Loan Agreement of Great Britain and Northern Ireland and the Government of the Kingdom of Belgium.	Belgium No. 1	September 7, 1949	Cmd. 7811
Agreement for Intra-European Payments and Compensations for 1949–50.	Misc. No. 13	September 7, 1949	Cmd. 7812
Report on the Proceedings of the First Session of the Council of Europe.	Misc. No. 14	August 8–September 8, 1949	Cmd. 7807
Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Netherlands, for the settlement of conflicting claims to German Enemy Assets in their respective territories.	Netherlands No. 1	September 20, 1949	Cmd. 7803

Title	Number (1949)	Date of Instrument	Reference
General Agreement on Tariffs and Trade. Third Session of the Contracting Parties (held at Annecy, April 8–August 13, 1949). Documents relating to the Third Session.		October, 1949	Cmd. 7791
Report on the Annecy Tariff Negotiations with text of the Annecy Protocol of Terms of Association to the General Agreement on Tariffs and Trade (Annecy, August 27, 1949).		October 10, 1949	Cmd. 7792
Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic supplementary to the General Agreement on Social Security of June 11, 1948.	Treaty Series No. 67	October 25, 1949	Cmd. 7816

II. STATUTORY INSTRUMENTS

Title	Number	Date of Instrument	Date of Operation
The Citizenship Law (New Zealand) Order, 1949.	No. 7	January 3, 1949	
The British Protected Persons Orders, 1934 to 1944 (Revocation) Order, 1949.	No. 131	January 28, 1949	February 1, 1949
The Cyprus Orders in Council (Revocation) Order in Council, 1949.	No. 132	January 28, 1949	February 1, 1949
The Diplomatic Privileges (International Labour Organisation) Order in Council, 1949.	No. 133	January 28, 1949	February 11, 1949
The Diplomatic Privileges (International Civil Aviation Organisation) Order in Council, 1949.	No. 134	January 28, 1949	February 11, 1949
The Diplomatic Privileges (International Refugee Organisation) Order in Council, 1949.	No. 135	January 28, 1949	February 11, 1949
The Diplomatic Privileges (World Health Organisation) Order in Council, 1949.	No. 136	January 28, 1949	February 11, 1949

Title	Number	Date of Instrument	Date of Operation
The Kamaran Order in Council, 1949.	No. 137	January 28, 1949	February 1, 1949
The Termination of Jurisdiction in Palestine (Transitional Provisions) Order in Council, 1949.	No. 138	January 28, 1949	February 1, 1949
The British Protectorates, Protected States and Protected Persons Order in Council, 1949.	No. 140	January 28, 1949	
The Registration of Naturalised Persons (Consular Officers) Regulations, 1949.	No. 278	January 29, 1949	March 1, 1949
The Citizenship Law (Australia) Order, 1949.	No. 170	February 1, 1949	
The Nyasaland Protectorate (Native Trust Land) (Amendment) Order in Council, 1949.	No. 356	March 4, 1949	
The Aliens (Exemption) (Burma) Direction, 1949.	No. 514	March 21, 1949	
The Leeward Islands and Windward Islands (Courts) (Amendment) Order in Council, 1949.	No. 600	March 29, 1949	
The Qatar Order in Council, 1949.	No. 595	March 29, 1949	April 12, 1949
The Kuwait Order in Council, 1949.	No. 593	March 29, 1949	April 12, 1949
The Muscat Order in Council, 1949.	No. 594	March 29, 1949	April 12, 1949
The Bahrein Order in Council, 1949.	No. 592	March 29, 1949	April 12, 1949
The Trucial States Order in Council, 1949.	No. 596	March 29, 1949	April 12, 1949
The Trading with the Enemy (Authorisation) (Germany) Order, 1949.	No. 605	March 29, 1949	
The Trading with the Enemy (Custodian) (Amendment) (Germany) Order, 1949.	No. 607	March 29, 1949	

Title	Number	Date of Instrument	Date of Operation
The Trading with the Enemy (Transfer of Negotiable Instruments, etc.) (Germany) Order, 1949.	No. 606	March 29, 1949	
The Diplomatic Privileges (United Nations Educational, Scientific, and Cultural Organisation) Order in Council, 1949.	No. 835	April 29, 1949	May 13, 1949
The Diplomatic Privileges (Food and Agriculture Organisation) Order in Council, 1949.	No. 834	April 29, 1949	May 13, 1949
The Diplomatic Privileges (International Refugee Organisation) Order in Council, No. 2, 1949.	No. 837	April 29, 1949	May 13, 1949
The Northern Rhodesian Order in Council 1949.	No. 1054	May 31, 1949	June 2, 1949
The Nyasaland Order in Council, 1949.	No. 1051	May 31, 1949	June 2, 1949
The Matrimonial Causes (War Marriages) (Leeward Islands) Order, 1949.	No. 1050	May 31, 1949	June 2, 1949
The Diplomatic Privileges (World Health Organisation and International Civil Aviation Organisation) (Amendment) Order in Council, 1949.	No. 1048	May 31, 1949	June 2, 1949
The Diplomatic Privileges (International Labour Organisation) (Amendment) Order in Council, 1949.	No. 1049	May 31, 1949	June 2, 1949
The Diplomatic Privileges (Brussels Treaty Permanent Commission) (Amendment) Order in Council, 1949.	No. 1055	May 31, 1949	June 2, 1949
The Consular Fees Order in Council, 1949.	No. 1052	May 31, 1949	August 1, 1949
The Registration Acts (Copies of Consular Entries) Application Order, 1949.	No. 1239	June 30, 1949	
The Merchant Shipping (Safety Convention) (Liberia) Order, 1949.	No. 1236	June 30, 1949	July 8, 1949

Title	Number	Date of Instrument	Date of Operation
The Foreign Marriage (Amendment) Order in Council, 1949.	No. 1235	June 30, 1949	July 14, 1949
The West African Territories (Air Transport) (Amendment) Order in Council, 1949.	No. 1234	June 30, 1949	August 1, 1949
The Trading with the Enemy (Custodian) Order, 1949.	No. 1083	June 9, 1949	
The Consular and Marriage Fees Regulations, 1949.	No. 1301	July 7, 1949	August 1, 1949
The Egypt Order in Council, 1949.	No. 1429	July 28, 1949	October 15, 1949
The Diplomatic Privileges (United Nations and International Court of Justice) (Amendment) Order in Council, 1949.	No. 1428	July 28, 1949	August 11, 1949
The Legal Aid and Advice Act, 1949 (Commencement) (No. 1) Order, 1949.	No. 1503	August 5, 1949	
The Diplomatic Privileges (Organisation for European Economic Co-operation) Order in Council, 1949.	No. 1831	September 29, 1949	October 13, 1949
The Togoland under United Kingdom Trusteeship Order in Council, 1949.	No. 1997	October 28, 1949	
The Nigeria (Legislative Council) (Amendment) Order in Council, 1949.	No. 2001	October 28, 1949	
The Nigeria (Protectorate and Cameroons) Order in Council, 1949.	No. 2003	October 28, 1949	
The Northern Territories (Amendment) Order in Council, 1949.	No. 1999	October 28, 1949	

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Editorial communications should be addressed to the Editor, Zelman Cowen, Esq., Oriel College, Oxford. Stamped addressed envelopes should accompany MSS. for acknowledgment and return. Books for review should also be sent to the Editor.